FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS AND ORDERS

JULY 1, 1985 TO DECEMBER 31, 1985

PUBLISHED BY THE COMMISSION

VOLUME 106

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 1985 TO DECEMBER 31, 1985

JAMES C. MILLER III, *Chairman*[1]
Took oath of office September 30, 1981

TERRY CALVANI, *Acting Chairman*[2]
Took oath of office November 18, 1983

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

GEORGE W. DOUGLAS, *Commissioner*[3]
Took oath of office December 27, 1982

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

[1]Resigned effective October 4, 1985.
[2]Appointed October 7, 1985.
[3]Resigned effective September 18, 1985.

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IN THE MATTER OF

TRISTATE HOUSEHOLD GOODS TARIFF CONFERENCE, INC.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9184. Complaint, Sept. 18, 1984—Order Dismissing Complaint, July 5, 1985

The Federal Trade Commission has dismissed the complaint in this matter since the collective ratemaking activities of respondent are immunized by the state action doctrine. The Commission has found that "further prosecution of this matter does not appear to be in the public interest."

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tristate Household Goods Tariff Conference, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For the purposes of this complaint the use of the present tense includes the past tense and the following definitions apply:

Carrier means a common carrier of property by motor vehicle.

Intrastate transportation means the pickup or receipt, transportation and delivery of property for compensation wholly within any State of the United States by a carrier authorized by that State to engage therein.

Tariff means a publication and any supplements thereto stating the rates of a carrier for the intrastate transportation of property, excluding general rules and regulations.

Member means any carrier or other person that pays dues or belongs to Tristate Household Goods Tariff Conference, Inc. or to any successor corporation.

Rate means a charge, payment or fixed price according to a ratio, scale or standard for direct or indirect transportation service.

Collective rate means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any carrier and respondent.

PARAGRAPH 1. Respondent, Tristate Household Goods Tariff Conference, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 410 N. Governor Printz Boulevard, PA Route 291, Lester, Pennsylvania. Respondent publishes and issues tariffs containing rates for the intrastate transportation of property on behalf of its member carriers.

PAR. 2. Carriers engaging in intrastate transportation of property within Pennsylvania do so under certificates of public convenience and necessity granted by the Pennsylvania Public Utilities Commission. Such carriers are subject to rate regulation by the said Commission and are required to charge just and reasonable rates. Carriers in Pennsylvania are required to charge the rates filed once they have been accepted by the said Commission.

PAR. 3. The statute which provides for regulation of carriers engaged in the intrastate transportation of property within Pennsylvania does not compel, command, authorize or otherwise provide for the establishment, operation or continuation of collective rates among carriers or others on their behalf.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, respondent's members are now in competition among themselves and with other carriers.

PAR. 5. Respondent's membership consists of approximately 450 carriers engaging in intrastate transportation of property within Pennsylvania. Respondent's members are entitled to and do, among other things, vote for and elect the officers and directors of respondent. The control, direction and management of respondent are vested in the Board of Directors, which employs a general manager who acts as chief administrative officer of the corporation with direct charge of and supervision over the affairs of the corporation.

PAR. 6. The acts and practices of respondent set forth in Paragraph Eight are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Respondent's acts and practices:

(A) Affect the flow of substantial sums of money across state lines

from businesses and other private parties to respondent's members for rendering intrastate transportation services;

(B) Affect respondent's members' purchase and use of equipment and other goods and services which are shipped across state lines; and

(C) Are supported by the receipt of dues and fees which are sent across state lines.

PAR. 7. Shippers use the intrastate services of respondent's members to transport property from warehouses and distribution centers in Pennsylvania to customers in Pennsylvania, which property was originally shipped into Pennsylvania from other states. For such intrastate deliveries of property from warehouses and distribution centers, carriers charge shippers or shippers' customers the intrastate rates published by respondent. These intrastate shipping charges are factors which influence the prices of such property. The intrastate delivery services of these carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, the activities of these carriers have a substantial and direct effect upon interstate commerce.

PAR. 8. Respondent, its members, officers, directors, and others are engaging in a combination, conspiracy, agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is to unlawfully hinder, restrain, restrict, suppress or eliminate competition among carriers engaged in the intrastate transportation of property within Pennsylvania.

Pursuant to and in furtherance thereof, respondent, its members and others engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates for the intrastate transportation of property within Pennsylvania;

(B) Participating in the collective rates; and

(C) Filing collective rates with the Pennsylvania Public Utilities Commission.

PAR. 9. The acts and practices of respondent, its members and others as alleged in Paragraph Eight have the effect of:

(A) Fixing, stabilizing, raising, maintaining, or otherwise interfering or tampering with the rates charged by carriers for the intrastate transportation of property within Pennsylvania;

(B) Restricting, restraining, hindering, preventing or frustrating rate competition among carriers for the intrastate transportation of property within Pennsylvania;

(C) Depriving shippers patronizing carriers for intrastate transpor-

tation of property within Pennsylvania of the benefits of free and open competition in the provision of said services; and

(D) Depriving consumers in Pennsylvania of the benefits of free and open competition in the intrastate transportation of property.

PAR. 10. The acts, policies and practices of respondent, its members and others, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

ORDER DISMISSING COMPLAINT

The Commission has considered this matter on complaint counsel's unopposed motion that the complaint be withdrawn.

In this case respondent has argued that its collective ratemaking activities are immunized by the state action doctrine. Complaint counsel now represents that all the elements of a state action defense as articulated by the Supreme Court in *Southern Motor Carriers Rate Conference v. United States,* 105 S.Ct. 1721 (1985), are available to the respondent. Accordingly, further prosecution of this matter does not appear to be in the public interest. The complaint is therefore dismissed.

IN THE MATTER OF

ASSOCIATED MILLS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9169. Complaint, Oct. 24, 1983—Decision, July 23, 1985

This consent order requires the Chicago, Ill. manufacturer and seller of the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699, among other things, to cease representing, contrary to fact, that this portable household air cleaning appliance removes most tobacco smoke and substantially all ragweed pollen and dust from the air people breathe under household conditions and that the appliance effectively filters all the air in a 14 foot × 18 foot room in less than an hour. The order also bars the firm from misrepresenting the ability of any such appliance or equipment to clean or remove any quantity of indoor air contaminants, or the conditions of use under which the appliance would remove the contaminents. Further, the company is required to possess competent and reliable evidence to support any claim relating to the performance characteristics of such appliance; and maintain written records of all materials that substantiate, contradict, or qualify performance claims.

Appearances

For the Commission: *Judith Wilkenfeld, Elizabeth Toni Guarino* and *Reid Horowitz.*

For the respondents: *Robert L. Wald* and *Mark Schattner, Wald, Harkrader & Ross,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Associated Mills, Inc., hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 111 N. Canal Street, Chicago, Illinois.

PAR. 2. Respondent is now, and at all times relevant to this com-

plaint has been, engaged in the manufacture and sale of a portable, electric household air cleaning appliance, the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 (hereinafter referred to in the complaint as "air cleaning appliance"), and other products to the public.

PAR. 3. Respondent operates in various States of the United States and in the District of Columbia. Respondent's manufacture, sale and distribution of air cleaning appliances mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent at all times mentioned herein has been and now is in competition with individuals, firms and corporations engaged in the sale of household air cleaning appliances and other products.

PAR. 5. In the course and conduct of its business, and for the purpose of promoting the sale and distribution of household air cleaning appliances, respondent has disseminated and caused the dissemination of advertising for household air cleaning appliances in national magazines, newspapers and catalogs distributed by the mail and across state lines. Respondent has also placed air cleaning appliance advertisements with television stations having sufficient power to broadcast across state lines and into the District of Columbia. In addition, respondent has distributed by mail or other means, product brochures and other sales literature directly to consumers or to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 6. Typical statements and representations in said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A, B, C, D, E, F and G.

PAR. 7. Through the use of the statements and representations referred to in Paragraph Six and other representations contained in advertisements and promotional materials not specifically set forth herein, respondent has represented, and now represents directly or by implication, the following claims:

a. The air cleaning appliance eliminates tobacco smoke from the air people breathe under household living conditions.

b. The air cleaning appliance cleans the air of or removes most tobacco smoke from the air people breathe under household living conditions.

c. The air cleaning appliance "takes out 99% of ragweed pollen" from the air people breathe under household living conditions.

d. The air cleaning appliance removes 80% of the dust from the air people breathe under household living conditions.

e. One air cleaning appliance effectively filters all the air in a 14 foot × 18 foot room in approximately 25 minutes.

PAR. 8. In truth and in fact, the direct or implied representations set forth in Paragraph Seven are false, for reasons including but not limited to the following:

a. The air cleaning appliance does not eliminate, does not clean the air of and does not remove most tobacco smoke from the air people breathe under household living conditions. Independent tests, when extrapolated by generally accepted procedures to advertised room conditions, show that the air cleaning appliance optimally can remove no more than 12% of tobacco smoke from the indoor air people breathe.

b. Respondent's tests and independent tests, when extrapolated by generally accepted procedures to advertised room conditions, show that the air cleaning appliance cannot remove 99% of ragweed pollen or 80% of dust from the indoor air people breathe.

c. Independent tests show that the air cleaning appliance cannot effectively filter all the air in a 14 foot × 18 foot room in approximately 25 minutes or in less than an hour.

Therefore, the direct or implied representations set forth in Paragraph Seven are false and misleading.

PAR. 9. Through the use of the advertisements and promotional materials referred to in Paragraph Six and other advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraph Seven at the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent either did not conduct appropriate tests or did not properly extrapolate test results by generally accepted procedures to advertised room conditions. Therefore, respondent's representations are false and misleading.

PAR. 10. The use by respondent of the aforesaid false and misleading representations, and the placement in the hands of others of the means and instrumentalities by and through which others may use the aforesaid statements and representations, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said representations are true and complete and to induce such persons to purchase air cleaning appliances sold by respondent by reason of said erroneous and mistaken belief.

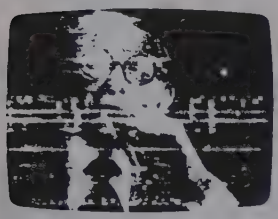
PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

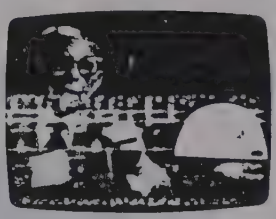
Pollenex

ASSOCIATED MILLS INC.

COMPANY: Associated Mills, Inc.
PRODUCT: Pollenex Pure Air "99"
COMMERCIAL TITLE: "George Burns 699 Pollen"
COMMERCIAL NO.: YAPP0056
LENGTH: 30 :05



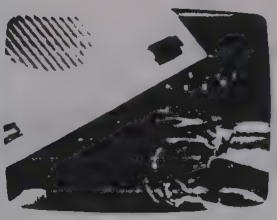
WHEN I SMOKE CIGARS AT HOME MY FRIENDS NEVER OBJECT.



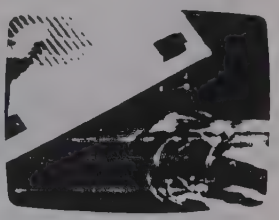
BECAUSE I'VE GOT A POLLENEX PURE AIR "99".

SMOKE GRABBER 6 STAGE FILTER WITH ACTIVATED CHARCOAL.

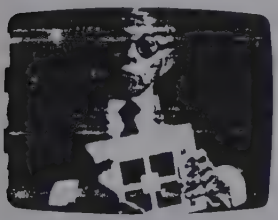
IT REMOVES SMOKE, POLLEN AND DUST. . .EVERYTHING BUT YOUR RELATIVES!



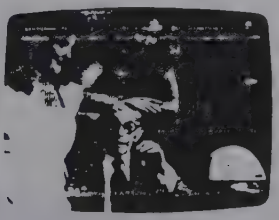
SMOKE GOES IN HERE. .



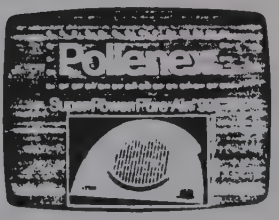
CLEAN AIR COMES OUT HERE.



AND IT'S EXTRA LARGE FILTER TAKES OUT 99% OF RAGWEED POLLEN.



THESE ARE MY FRIENDS, THEY'RE CRAZY ABOUT MY PURE AIR "99" FROM POLLENEX.



(LOCAL DEALER TAG)

EXHIBIT B

Pollenex®

Air Cleaner/Deodorizer

Clears the air of smoke in minutes. Lab tests prove it!

- Tests showed that in a matter of minutes approximately 85% of the tobacco smoke in the chamber containing Pure Air "99"™ had dissipated.
- Filter material proven in tests over 30 years on purifiers retailing up to $400.
- **Electrostatic dust and dirt trap.** Air passing through this basic filter material, consisting of thousands of interconnecting fibers, creates a highly effective natural electrostatic charge that captures and holds dust and dirt.
- Filter proven to remove dust, pollen and other impurities from the air.
- Activated charcoal proven to remove smoke and other household odors.
- Bigger filter capacity than major competitors.
- Long-lasting lemon-lime fragrance proven to freshen air.
- Use on table, counter or mount on wall.
- Two speeds of air re-circulation.
- Backed by Pollenex' name and $3,000,000 Network Prime Time T.V.
- Local T.V. in top markets (over 300 GRP's per market)
- Network T.V. game shows.

Sealed tight chamber filled with tobacco smoke, without Pure Air "99"
Sealed tight chamber filled with an equal amount of tobacco smoke with Pure Air "99" in operation.

Watch for George Burns as TV spokesperson for Pure Air "99"™ starting Sept. 1.

#1 Pollenex No. 1 in health care appliances.

See us at the Hardware Show, Booths M-1002, M-1101

PURE AIR '99' with the proven filter

EXHIBIT C

Pollenex
99% PureAir 99%
Air Cleaner/Deodorizer
As Advertised on TV
"IT REMOVES SMOKE, POLLEN AND DUST... EVERYTHING BUT YOUR RELATIVES!"
Smoke GRABBER
• "6-Stage" Filter with Activated Charcoal
• More powerful
• Larger filter
• Quiet setting for sleeping
Smoke GRABBER
Exclusive 6-Stage Filter*
Filters and treats air containing tobacco smoke, pollen, dust, household odors and gases
1 Impingement fibers intercept larger airborne particles of pollen, dust and dirt
2 Fibers are impregnated with a unique coating that holds particles in the filter material
3 ACTIVATED CHARCOAL absorbs household gases and odors from tobacco smoke, cooking and other sources
4 ABSORBEAD™ Crystals attract even more smoke and other odors
5 Final Filter removes sub-micron remnants of tobacco smoke and airborne pollutants
6 Special coating on final filter provides electrostatic action that holds captured minute smoke and other particles
Recommended for room sizes approximately 18' x 14' x 8'
*PAT. PENDING
© 1982 Associated Mills, Inc. 111 N. Canal St. Chicago, IL 60606

EXHIBIT D

Pollenex

Pure Air "99"™

Air Cleaner/ Deodorizer

With Fragrance Control

Model 699

INSTRUCTIONS AND WARRANTY

© 1981 Associated Mills, Inc

UL

LIMITED WARRANTY

The product listed is warranted to be free from defects in material and workmanship under normal use and service for a period of 90 days from date of sale to consumer. The manufacturer's obligation shall be limited to repairing or replacing F.O.B. Chicago, Ill. 60606, any part of the product which is defective. Such warranty shall not apply to defects resulting from accidents, abuse or misuse. If you must return the product for reasons of malfunction, the following action and steps are required:

a. Package the product securely to protect from damage or breakage in shipment.

b. Ship prepaid to Associated Mills by most convenient method.

This warranty gives you specific legal rights and you may also have other rights which vary from state to state. Return of owner registration card is not a condition precedent to warranty coverage.

ASSOCIATED MILLS, INC.
111 N. Canal, Chicago, IL 60606

POSTCARD

ASSOCIATED MILLS, INC.
111 N. CANAL
CHICAGO, IL 60606

PLACE STAMP HERE

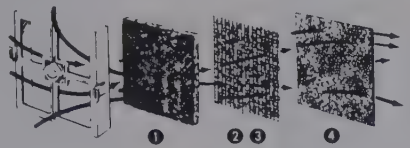
Complaint

5

HOW YOUR POLLENEX® PURE AIR "99"™ MODEL 699 WORKS

You have purchased one of the latest air filtration systems for the home or office

Your Model 699 Pure Air "99"™ air cleaner and deodorizer has a specially designed fan that forces air through the unique Pollenex® "Stage 4"™ filter that helps clean and deodorize air polluted with pollen, dust and tobacco smoke



EXCLUSIVE "STAGE 4"™ FILTERING SYSTEM

1. Unique Pollenex® filtering material, written up in medical journals and proven in use for over 30 years. A natural electrostatic dust and dirt trap
2. ACTIVATED CHARCOAL to remove smoke and other odors
3. ABSORBEADS™ to help trap dust, dirt and lint
4. Final filter for final air check

HOW TO OPERATE YOUR POLLENEX® PURE AIR "99"™

Snap out filter on base of unit and remove from plastic wrap. Re-install filter with side latches up. Snap back in place. Do not have unit connected to electrical outlet while you are removing or replacing filter. Have switch in "off" position. To operate, plug cord into electric outlet, turn switch to either HI or LOW speed and your unit is in operation. Unit operates from 110 to 120 volts AC 60Hz

WHERE TO USE YOUR POLLENEX® PURE AIR "99"™

Use it anywhere in the home or office where you'd like to enjoy fresher air: kitchen, bath, bedroom, living room, dining room, powder room, pet areas, sick room, or private office, conference room, reception area

HOW TO GET THE MOST FROM YOUR POLLENEX® PURE AIR "99"™

You'll enjoy fresher air continuously if you run the unit constantly. It's built for that kind of service. Works effectively in filtering about the same amount of air as would normally be contained in a room 18'x14' in approximately 25 minutes. That way you're recirculating, cleaning and deodorizing air every quarter of an hour or so, when your unit is set on high speed

When you first turn on unit, if possible, shut doors and windows in the room. Let unit run on high speed in the closed room for about 30 minutes. That way you'll get an initial concentration of effort. Then you can open the doors and the unit will continue working effectively

HOW TO USE THE EXCLUSIVE FRAGRANCE CONTROL

Fragrance beads and their control are located in the center of the frame covering Stage 1 of the filter. Dial "OFF" for no scent, "HI" or "LO" for a light Citrus scent

WHAT ABOUT THE POLLENEX® "STAGE 4"™ FILTER? HOW LONG DOES IT LAST?

IMPORTANT: If you choose to enjoy the light Citrus fragrance you will notice that it will gradually diminish. Effectiveness of filter is not diminished by absence of the odor and is designed to have a long life. If the unit runs constantly, the filter will need replacement only once every two to three months

Replacement filters are available at your Pollenex® Pure Air "99"™ dealer. If he is temporarily out of stock, write Associated Mills/Pollenex®, 111 N. Canal St., Chicago, IL 60606 for the name of another nearby dealer

HOW TO CARE FOR YOUR POLLENEX® PURE AIR "99"™

This unit needs no lubrication. It is engineered to give long useful service with a minimum of care. The exterior housing is made of high impact plastic. To remove dust or fingerprints just use mild soap on a wet cloth. Use a dry cloth to wipe off excess water. Do not use harsh industrial detergents

CAUTION: Be sure to unplug unit before cleaning. Do not immerse unit in water — it will cause permanent damage to unit and could be very dangerous to you

Associated Mills, Inc. • 111 N. Canal Street • Chicago, IL 60606

Pollenex

Pure Air "99"™ Air Cleaner Deodorizer

OWNER REGISTRATION CARD

COMPLETE AND MAIL WITHIN 10 DAYS

PLEASE CHECK APPROPRIATE MODEL NO. [illegible] **Model 699** **Other**

YOUR NAME [illegible]

Please Complete and Please Print

YOUR SIGNATURE [illegible] 17 18

ADDRESS [illegible]

[illegible]

DATE [illegible] 12 16 [illegible] 19 20

Please Check 21 ARE YOU

1 **Purchaser/Co purchaser**
or **Gift Recipient**
2 Live in purchaser's household
3 Live in different household
or **Person other than above completing card**
4 In purchaser's household
5 In different household

22 Your Age
1 Under 25
2 26-35
3 36-55
4 56-65
5 66+

23 Your Sex
1 Male
2 Female

24 Who primarily decided to buy?
1 Woman
2 Man
3 Both equally

25 Marital Status
1 Married
2 Single
3 Other

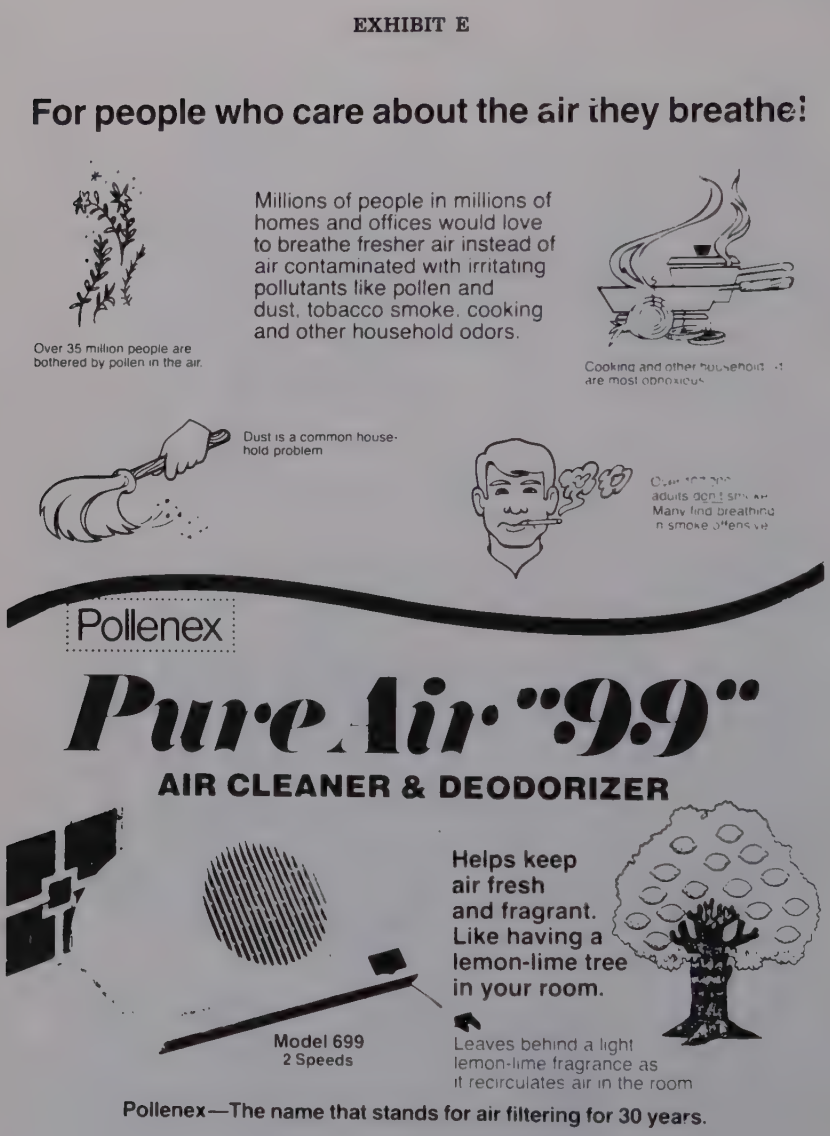
26 Who will use?
1 Self only
2 Self and other
3 Other only
4 Children's [illegible]

27 Purchase Recommended By
1 Doctor
2 Other

Became interested in Product Through
1 Advertisement
2 Store Display
3 Store Clerk
4 Wife
5 Husband
6 Friend
7 Other

43 For what MAIN Purpose was Product Purchased? Check only one
A Help alleviate breathing problem
B Help alleviate asthma
C Help alleviate allergy
D Help eliminate dust
E Help eliminate tobacco odor
F Help eliminate pollen
G Help eliminate kitchen odor
H Help eliminate bathroom odor
I Help eliminate pet odor
J Help keep air fresher [illegible]
K Freshens air with lemon lime [illegible]

EXHIBIT E


For people who care about the air they breathe!
Over 35 million people are bothered by pollen in the air.
Millions of people in millions of homes and offices would love to breathe fresher air instead of air contaminated with irritating pollutants like pollen and dust, tobacco smoke, cooking and other household odors.
Cooking and other household odors are most obnoxious
Dust is a common household problem
Many find breathing in smoke offensive
Pollenex
Pure Air "99"
AIR CLEANER & DEODORIZER
Helps keep air fresh and fragrant. Like having a lemon-lime tree in your room.
Model 699
2 Speeds
Leaves behind a light lemon-lime fragrance as it recirculates air in the room
Pollenex—The name that stands for air filtering for 30 years.

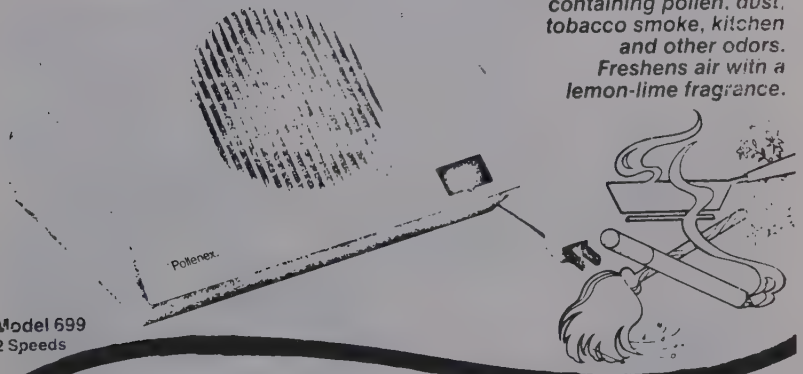
Pollenex

NEW

Pure Air "99"

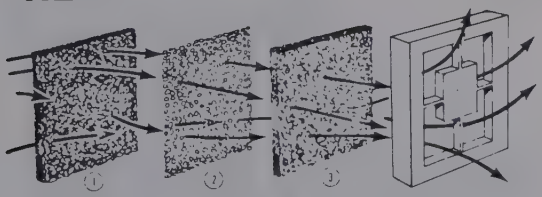
AIR CLEANER & DEODORIZER

Helps filter and treat air containing pollen, dust, tobacco smoke, kitchen and other odors. Freshens air with a lemon-lime fragrance.



Model 699
2 Speeds

NEW! EXCLUSIVE POLLENEX FILTERING SYSTEM



AIR IS RECIRCULATED THROUGH ① Exclusive Pollenex filter with activated charcoal for air cleaning and deodorizing. Filter material proven in tests over 30 years on Pollenex air filters. ② Crystal particles saturated with a lemon-lime fragrance to freshen air. ③ Final filter before air is recirculated to room.

Printed in U.S.A. © Associated Mills, Inc. 111 N. Canal St. Chicago, IL 60606

EXHIBIT F

POLLENEX••••PROFIT EDITION

Booming Sales Predicted for Indoor Air Cleaner

over 102,000,000 Americans are Bothered by tobacco smoke

The trend toward non smokers has been increasing rapidly over recent years. Moreover, those who find being subjected to tobacco smoke offensive, are increasing substantially in number.

The Pure Air "99"™ is ideal for homes and offices that are subjected to tobacco smokers and where treatment of air containing tobacco smoke is desirable for a variety of reasons.

New way to deal with household odors without chemical sprays

Homes collect odors like they collect dust. Chemical sprays that mask them are not only expensive but not the most desirable way to eliminate odors.

With homes tightly sealed today, to save energy costs, cooking odors, bathroom odors, pet odors, tobacco odors and all kinds of household odors are offensive and embarrassing.

New Pure Air "99"™ helps fight odors, as it filters air with the unique Pollenex® "Stage 1"™ Filtering System. As it recirculates and helps clean and deodorize air, it leaves behind a refreshing lemon lime fragrance.

Pollenex® has over 30 years experience in Air Filtering Systems

Pollenex® has been a pioneer in the field of indoor air filtering, for more than three decades. The basic Pollenex® filtering material has been tested in use in air filtering machines retailing for as much as $400.00.

The Pollenex® Pure Air "99"™ Model 699 is the cumulation of all that testing, plus modern technological advances in the engineering of air cleaning and deodorizing systems. You can't find a more advance design piece of equipment for the money.

Over 23,000,000 people are bothered by Pollen in the air

The new Pure Air "99"™ helps filter out pollen. Independent Laboratory Testing show over 90% effectiveness of removal of Giant Ragweed Pollen in air that passes through the Pollenex® filter.

Moreover, the Pollenex filter in independent tests shows 80% effectiveness in removing fine dust particles that pass through the filter.

Those who care about the air they breathe, will find life pleasanter in an environment of fresher, cleaner air. Pure Air "99"™ is a product the whole family will appreciate.

Pollens that are allergenic are those that can be borne by the wind currents. In addition to buoyancy, other factors contribute to a pollen's importance as an allergen. One is the ability of a common plant to produce pollen in large quantities such as ragweed. A single plant of ragweed is believed estimated to produce 1,000,000,000 grains of pollen in one day.

Pollenex

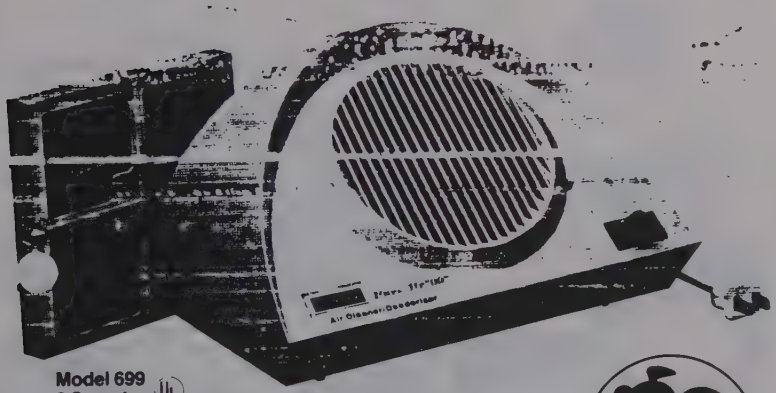
Pure Air "99"™

Air Cleaner/Deodorizer

Pollenex

Pure Air "99"™

Air Cleaner/Deodorizer

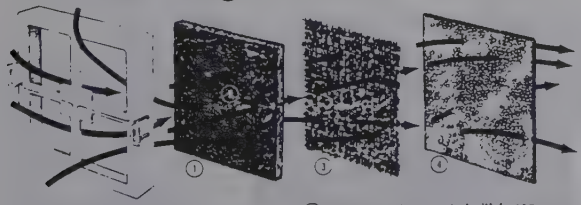


Model 699
2 Speeds

Freshens air with a lemon-lime fragrance

NEW!

Exclusive "Stage 4"™ Filtering System



① Exclusive Pollenex® filtering material.
② Treated with activated charcoal.
③ PA99™ crystals saturated with lemon-lime fragrance.
④ Final filter for final air check.

A specially designed fan forces air through a 4-way air filtration system, helps clean and deodorize air polluted with pollen, dust, tobacco smoke, cooking odors, pet odors and other pollutants. Filters about the same amount of air as would normally be contained in a room 12 X 9' in approximately 15 minutes and it leaves behind a light lemon-lime fragrance.

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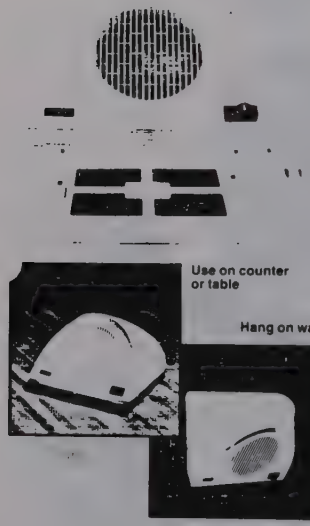
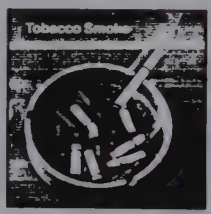
Pollenex

Pure Air "99"

Air Cleaner/Deodorizer



Filters and treats air containing:



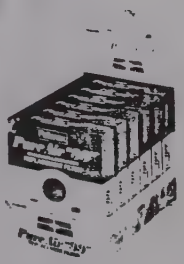
Enjoy all the benefits of fresher air in any room.

Pollenex® gives you the product, the package, and all the point-of-sale material you need to build a big booming business.

ramatic Counter Display
Compact, contemporary design. Made of durable plastic. Motivating selling message. Can be used with unit connected or disconnected.

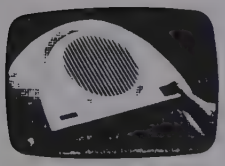
Dynamic Packaging
4-color graphics with full explanation of product, its features and benefits and where it can be used.

Replacement Filter Display
For continuous plus sales. Filters need replacing every two to three months.



PRIME TIME NETWORK T.V. AND MORE!

The biggest advertising program ever put behind an air cleaner/deodorizer.



'ork T.V.
'nillion dollars in network television
ing a select group of top T.V. shows
for Fall 1981.

Network Game Shows
Targeted to the best potential market for air cleaners

Local Market Spot T.V.
High impact, memorable spots with local dealer names in hundreds of T.V. markets

Magazine Ads
Big space, highly informative, in-depth sell ads in top magazines, reaching the best potential customers.

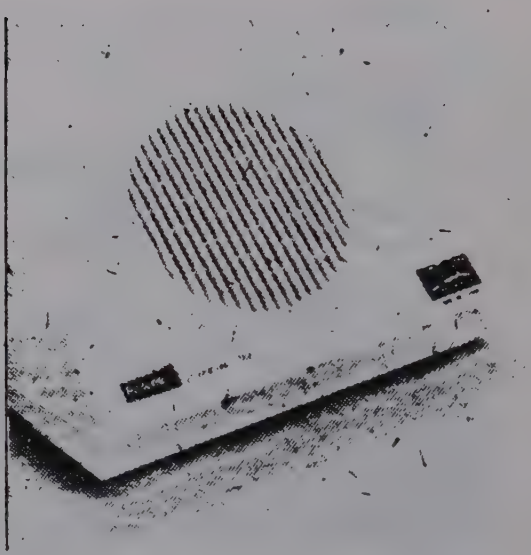
The New York Times
Chicago Tribune
Los Angeles Times
Dallas Times Herald
The Miami Herald

National Publicity Programs
All over America, in all media, people will be hearing about the amazing new Pollenex® Pure Air "99"™

EXHIBIT G

Pollenex "Pure Air 99" Air Purifier
Reg. 34.95, sale 23.99 less $4 manufacturer's rebate

Unique "smoke grabber" filter eliminates odors, and smoke from the air. Six stage filtering system with activated charcoal has 2 continuous speeds. Extra filters are **5.99 each.**



Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a proposed form of order; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Associated Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 111 N. Canal Street, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions apply:

1. The terms *air cleaning appliance or equipment* and *appliance or equipment* mean portable household electric cord connected room air cleaners (excluding ashtrays), defined more specifically as machines that (a) operate with an electrical source of power and contain a motor and fan for drawing air through a filter(s); (b) incorporate electrically charged plates in addition to a fan with a filter(s); (c) incorporate a negative ion generator in addition to a fan with a filter(s); or (d) incorporate a negative ion generator only.

2. The term *indoor air contaminants* refers to one or more contaminants including, but not limited to, tobacco smoke, household dust, pollen, or other forms of indoor air pollution.

3. The term *performance characteristics* means:

a. the power, strength or capacity of the appliance or equipment whether expressed in terms of volume of air circulated or in terms of room sizes or otherwise;

b. the cleaning, filtration, or removal ability or speed of operation of the appliance or equipment whether expressed generally or in terms of a specific contaminant, in terms of the filtering media or mechanism, or in terms of the appliance itself.

PART I

It is ordered, That respondent Associated Mills, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, contrary to fact, that the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 cleans the air of most or removes most tobacco smoke from the air people breathe under household living conditions.

B. Representing, directly or by implication, contrary to fact, that the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 removes substantially all ragweed pollen or dust from the air people breathe under household living conditions.

C. Representing, directly or by implication, contrary to fact, that the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 effectively filters all the air in a 14 foot $\times$ 18 foot room in less than an hour.

PART II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 or any other air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean or remove indoor air contaminants.

B. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean or remove any quantity of indoor air contaminants.

C. Misrepresenting in any manner, directly or by implication, the conditions of use under which any such appliance or equipment will clean or remove indoor air contaminants.

D. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean air or remove indoor air contaminants from enclosures or rooms of any specified size or within any specified period of time.

PART III

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Pollenex Pure Air "99" Air Cleaner/Deodorizer Model 699 or any other air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, the performance characteristics of any such appliance or equipment unless respondent possesses and relies upon a reasonable basis for such representation. A reasonable basis shall consist of competent and reliable evidence which substantiates such representation. To the extent the evidence of a reasonable basis consists of scientific or professional tests, experiments, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies, or other evidence are conducted and evaluted in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

B. Representing, directly or by implication, that any air cleaning appliance or equipment will perform under household living conditions, unless respondent possesses and relies upon competent and reliable scientific tests, experiments, analyses, research or studies which either relate to those conditions or which have been extrapolated by generally accepted procedures to those conditions.

PART IV

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order;
2. Of all test reports, studies, surveys or demonstrations in its possession that materially contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials or post purchase materials making such claim or representation were last disseminated. Such records shall be made available to the Commission staff for inspection upon reasonable notice.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertisements or other sales materials.

PART VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART VII

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

HAWAII DENTAL SERVICE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3158. Complaint, July 26, 1985—Decision, July 26, 1985

This consent order requires the Hawaii Dental Service Corporation ("HDS"), an organization engaged in the administration and operation of pre-paid dental care programs whose dentist members provide dental care service for a fee, among other things, to cease basing its decision to send dentists to the counties of Maui, Kauai, and Hawaii, on the approval or consent of member dentists who reside in those counties. The order bars the organization from denying membership to any dentist licensed to practice in Hawaii, based in whole or in part on the approval of other dentists in the geographic location of the dentist's proposed practice, and from inducing, encouraging, or assisting any dentist or other nongovernmental organization to take any of the prohibited actions. Within thirty days from the effective date of the order, HDS is required to remove from its constitution and bylaws or other guidelines, any provision, interpretation or policy statement that is inconsistent with the order and publish in its newsletter and another publication, a notice of such removal.

Appearances

For the Commission: *Erika Woodinski* and *Ralph E. Stone.*

For the respondents: *Wesley Ishikawa,* Honolulu, Hawaii.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Hawaii Dental Service Corporation ("HDS") is a dental service corporation formed pursuant to the laws of the State of Hawaii with its mailing address at 700 Bishop Street, Suite 700, Honolulu, Hawaii. HDS is engaged in the business of the administration and operation of prepaid dental care programs.

PAR. 2: Members of HDS are engaged in the business of providing dental care services for a fee. Except to the extent that competition

has been restrained as herein alleged, members of HDS have been and are now in competition among themselves and with other dentists. Members of HDS elect the board of directors of HDS.

PAR. 3. HDS engages in substantial activities which further its members' pecuniary interests. By virtue of its purposes and activities, HDS is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. In the conduct of their business, members of HDS receive and treat patients from other states, receive substantial sums of money for rendering dental services, which monies flow across state lines, and use supplies which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of HDS's members, third-party payers, other third parties, and some patients of HDS's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 5. One factor that consumers consider in deciding whether to purchase a prepaid dental service plan is whether the plan has an adequate supply of participating dentists. In the absence of the restraints on competition alleged in this complaint, HDS would be able to make its plan more attractive to consumers by seeking to recruit dentists and send them to be participating dentists in the counties of Maui, Kauai, and Hawaii. Such activities by HDS could increase competition among dentists and increase access to dental care in those counties.

PAR. 6. HDS has acted as a combination of at least some of its members or has agreed with at least some of its members to limit, foreclose, frustrate, or eliminate competition among dentists in the State of Hawaii by agreeing to restrictions on its ability to freely recruit and send dentists to the counties of Maui, Kauai, and Hawaii.

PAR. 7. HDS has acted in furtherance of this combination or agreement by enacting restrictions in its bylaws that prohibit HDS from recruiting and sending dentists to the counties of Maui, Kauai, or Hawaii without the approval of the majority of its members who reside in the affected county, thereby according HDS's members in these counties the power to exclude competition.

PAR. 8. Through the combination or agreement and the acts described above, certain individual members or potential members of HDS are likely to have been or are likely to be deterred from establishing practices in the counties of Maui, Kauai, and Hawaii, to the effect that:

A. Competition among dentists for patients may have been and may be limited, foreclosed, frustrated or eliminated; and

B. Consumers may have been and may be deprived of the benefits of competition among dentists.

PAR. 9. The combination or agreement and the acts described above constitute unfair methods of competition and unfair acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or agreement is continuing and will continue absent the entry against HDS of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Hawaii Dental Service Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Hawaii with its office and principal place of business located at 700 Bishop Street, Suite 700, Honolulu, Hawaii.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. *HDS* means respondent Hawaii Dental Service Corporation, its Board of Directors, officers, committees, representatives, agents, employees, successors, and assigns; and

B. *Member dentist* means a dentist with whom HDS has a contractual agreement to render dental care to beneficiaries of HDS dental care plans.

II.

It is ordered, That HDS, directly or indirectly, or through any corporation or other device, in connection with the administration and operation of prepaid dental care programs in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Basing the decision to send dentists, dentist groups, or dentist panels to the counties of Maui, Kauai, and Hawaii, in whole or in part, on the approval or consent of other member dentists who reside in those counties;

B. Denying membership in HDS to a dentist licensed to practice in the State of Hawaii based in whole or in part on the approval or consent of other member dentists to the geographic location of the dentist's proposed practice; and

C. Inducing, urging, encouraging, or assisting any dentist, group of dentists, or any other non-governmental organization to take any of the actions prohibited by Part II of this order.

III.

It is further ordered, That HDS shall:

A. Within thirty (30) days after this order becomes final, remove from its constitution and bylaws, and from any other existing policy statements or guidelines of HDS, any provision, interpretation or policy statement which is inconsistent with Part II of this order, and within sixty (60) days after this order becomes final, publish in the *Hawaii Dental Service Newsletter* and one other publication generally circulated to dentists practicing in the State of Hawaii, a notice of the

removal of such provision, interpretation, policy statement or guideline;

B. Within thirty (30) days after this order becomes final, distribute a copy of this order to each of HDS's supervisory personnel having procedural or policy responsibilities with respect to the subject matter of this order, and secure a signed statement acknowledging receipt of said order;

C. Within ninety (90) days after this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order;

D. For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by this order; and

E. Within one (1) year after this order becomes final, and annually thereafter for a period of four (4) years, file, if requested by Commission staff, a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by this order.

IV.

It is further ordered, That HDS shall notify the Commission at least thirty (30) days prior to any proposed change in HDS, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in HDS which may affect compliance obligations arising out of this order.

IN THE MATTER OF

DECORATING PRODUCTS ASSOCIATION OF CENTRAL FLORIDA

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3159. Complaint, July 26, 1985—Decision, July 26, 1985

This consent order requires Decorating Products Association of Central Florida (DPACF), an association composed of wallcovering retailers and suppliers, among other things, to cease, individually or in concert with others, engaging in conduct having the purpose or effect of fixing prices, terms or conditions of sale of wallcoverings; coercing sellers of wallcoverings to adopt or abandon any practice or policy concerning pricing, conditions of sale, distribution method, or choice of customers. DPACF is also barred from suggesting or recommending to its members that they refuse to deal or otherwise attempt to affect a supplier's pricing or distribution methods; and from assisting any affiliated organization or its members in engaging in the prohibited conduct. The organization is further required to mail a copy of the order to each of its members and to publish it in its newsletter in a timely fashion. Finally, the order obligates DPACF to require its members to agree in writing to be bound by the terms of the order as a condition of membership; and to terminate for a period of one year any member believed to have engaged in the prohibited practices after the effective date of the order.

Appearances

For the Commission: *Kevin T. Cronin* and *Joseph Eckhaus.*

For the respondents: *J. Thomas Cardwell, Akerman, Senterfitt & Eidson,* Orlando, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the above caption has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

A. *Wallcoverings* mean flexible materials used to cover residential

and commercial walls, such as simple wallpapers, vinyls, fabrics and foils.

B. *Supplier* means a manufacturer or a distributor of wallcoverings or an entity engaged in the sale of wallcoverings to others for resale to consumers.

PAR. 2. Respondent Decorating Products Association of Central Florida ("DPACF") is an unincorporated association, organized in or about May, 1980, with its mailing address at Post Office Box 183, Orlando, Florida. DPACF is a local affiliate of the National Decorating Products Association ("NDPA"). Membership in DPACF constitutes membership in NDPA. NDPA and DPACF are composed of full voting members, which are retail businesses engaged in the promotion and sale of wallcoverings, and non-voting associate members, which are suppliers of wallcoverings.

PAR. 3. DPACF was organized, *inter alia,* to facilitate the exchange of information among its members concerning methods for conducting business in the sale and distribution of wallcoverings. Its affairs are discussed and policy determined at monthly meetings presided over by DPACF's president.

PAR. 4. Full voting members of respondent are engaged in the operation of retail decorating products stores where wallcoverings are sold. Annual retail sales of wallcoverings in the United States are approximately $1.5 billion. Except to the extent that competition has been restrained as herein alleged, full voting members of respondent have been and are now in competition among themselves and with other retail sellers of wallcoverings.

PAR. 5. Respondent engages in substantial activities which further the pecuniary interests of its members. By virtue of its purposes and its activities, respondents are corporations within the meaning of Section 4 of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 44.

PAR. 6. Respondent, and its members, engage in acts and practices, including the acts and practices described below, which are in or affect commerce within the meaning of the Federal Trade Commission Act, *as amended.*

COUNT I

PAR. 7. Respondent DPACF has acted as a combination of, or has conspired with, at least some of its members to restrain competition by refusing to deal with a supplier that was planning to open a chain of retail wallcovering stores.

PAR. 8. Respondent DPACF and at least some of its members have engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things:

A. Removing, or urging and encouraging members and others to remove, certain wallcovering sample books from their store shelves;

B. Discontinuing, or urging and encouraging members and others to discontinue, promotion of the products of certain suppliers;

C. Not placing, or urging and encouraging members and others not to place, customer orders for wallcoverings through certain suppliers.

PAR. 9. The combination or conspiracy and the acts and practices alleged in Paragraphs Seven and Eight have had, or have the tendency or capacity to have, the following effects, among others:

A. Restraining competition in connection with the sale and distribution of wallcoverings;

B. Restraining the ability of suppliers to distribute wallcoverings in a manner that would place suppliers in competition with respondents' members and other retail sellers of wallcoverings;

C. Depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of wallcoverings.

PAR. 10. The combination or conspiracy and the acts and practices alleged in Paragraphs Seven and Eight constitute unfair methods of competition or unfair or deceptive acts and practices by respondent in violation of Section 5 of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 45.

COUNT II

PAR. 11. Respondent DPACF and others have combined or conspired between and among themselves, and with at least some of their members to restrain competition by attempting to fix or restrain the prices paid to wallcovering suppliers by retailers, and by refusing or threatening to refuse to deal with suppliers that imposed charges for cutting single rolls of wallcovering.

PAR. 12. Respondent DPACF and at least some of their members and others have engaged in various acts or practices in furtherance of these combinations or conspiracies, including, one or more of the following:

A. Threatening, and urging members to threaten, to refuse to deal with suppliers that imposed cutting charges;

B. Refusing to pay, or urging members to refuse to pay, cutting charges imposed by suppliers;

C. Publishing and circulating to suppliers, and others, statements implying that members would refuse to deal with suppliers imposing cutting charges, or urging members to refuse to pay cutting charges imposed by suppliers.

PAR. 13. The combination or conspiracy and the acts and practices

alleged in Paragraphs Eleven and Twelve have had, or have the tendency or capacity to have, the following effects, among others:

A. Fixing, maintaining, or stablizing prices of wallcoverings;

B. Restraining competition in connection with the sale and distribution of wallcoverings;

C. Depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of wallcoverings.

PAR. 14. The combination or conspiracy and the acts and practices alleged in Paragraphs Eleven and Twelve constitute unfair methods of competition or unfair or deceptive acts and practices by respondent in violation of Section 5 of the Federal Trade Commission Act, *as amended.*

COUNT III

PAR. 15. Respondent DPACF has acted as a combination of, or has conspired with, at least some of its members to restrain competition by refusing or threatening to refuse to deal with suppliers engaged in the direct sale of wallcoverings to building contractors.

PAR. 16. Respondent DPACF and at least some of its members have engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things:

A. Publishing statements urging members to refuse to deal with suppliers that sell directly to building contractors;

B. Identifying in published statements a supplier involved in the direct sale of wallcoverings to building contractors and urging members to refuse to deal with such suppliers;

C. Threatening and attempting to coerce suppliers into discontinuing their direct sales to building contractors.

PAR. 17. The combination or conspiracy and the acts and practices alleged in Paragraphs Fifteen and Sixteen have had, or have the tendency or capacity to have, the following effects, among others:

A. Restraining competition in connection with the sale and distribution of wallcoverings;

B. Depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of wallcoverings.

PAR. 18. The combination or conspiracy and the acts and practices alleged in Paragraphs Fifteen and Sixteen constitute unfair methods of competition or unfair or deceptive acts and practices by respondent in violation of Section 5 of the Federal Trade Commission Act, *as amended.* These combinations or conspiracies, as well as those alleged

in Counts I and II, are continuing and will continue in the absence of appropriate relief.

Decision and Order

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent is an unincorporated association with its mailing address at P.O. Box 183, Orlando, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *DPACF* means the Decorating Products Association of Central Florida (an unincorporated association with its mailing address at

P.O. Box 183, Orlando, Florida), its members, officers, directors, committees, representatives, agents, employees, successors and assigns.

B. *Wallcoverings* mean flexible materials used to cover residential and commercial walls, such as simple wallpapers, vinyls, fabrics and foils.

II.

It is further ordered, That DPACF, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, shall cease and desist from:

A. Conduct having the purpose or effect of:

1. fixing, maintaining, or stabilizing prices, terms or conditions of sale of wallcoverings;

2. coercing any seller of wallcoverings to adopt, abandon, or refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

B. Expressly or impliedly advocating, suggesting, advising, or recommending that any of DPACF's members refuse to deal with any seller of wallcoverings on account of, or that any of DPACF's members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

C. Publishing or circulating the results of any survey of, or otherwise identifying, prices, terms or conditions of sale, distribution methods, or choice of customers of any seller of wallcoverings in order to coerce, compel or induce any seller of wallcoverings to adopt or abandon or to refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

D. Aiding or assisting any affiliates of the National Decorating Products Association ("NDPA") or NDPA members in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That this order shall not be construed to prevent DPACF from providing information or its members' views to other sellers of wallcoverings, provided, however, that the information or views are not presented in a manner constituting an actual or threatened refusal to deal.

IV.

It is further ordered, That DPACF shall:

A. Within 30 days following service of this order, mail a copy of this order to each of its members.

B. Within 60 days following service of this order, publish this order in an issue of DPACF's newsletter in the same type size normally used for articles in the DPACF's newsletter.

C. As a condition of continued membership in DPACF, require within 90 days following service of this order, or as a condition of initial membership in DPACF, require within 90 days of such membership, that any members agree in writing to be bound by the provisions of Part II of this order.

D. Terminate for a period of one year its affiliation with any DPACF member within one hundred and twenty (120) days after learning or having reason to believe that said member has engaged, after the date this order becomes final, in any act or practice that, if engaged in by DPACF would be prohibited by Part II of this order.

V.

It is further ordered, That DPACF shall:

A. Within sixty (60) days following service of this order, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to DPACF, require.

B. For a period of three (3) years following service of this order, maintain in its files a copy of all correspondence received from, or sent to, sellers of wallcoverings, associations of sellers of wallcoverings, or other DPACF members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request.

C. Notify the Commission at least thirty (30) days prior to any proposed change in DPACF's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance obligations arising out of this order.

IN THE MATTER OF

SALOMON/NORTH AMERICA, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2859. Consent Order, Jan. 6, 1977—Modifying Order, July 30, 1985

This order modifies the 1977 consent order (89 F.T.C. 24) issued against respondent by deleting provisions in the original order that prohibited the company from barring transshipment (sales between retailers) or limiting the retail locations from which dealers may sell its products. The modifying order is the result of respondent's request to the Commission for modification of the terms of the original order.

ORDER REOPENING AND MODIFYING ORDER ISSUED ON JANUARY 6, 1977

On March 25, 1985, respondent Salomon/North America, Inc. ("Salomon") filed its "Request of Salomon/North America, Inc. for Modification of Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding in Docket No. C-2859 and to modify the order issued by the Commission in this case on January 6, 1977, by deleting the provisions that restrict Salomon's ability to limit the transshipping of its products and that prohibit Salomon from limiting the retail locations from which dealers may sell its products. Salomon also requests deletion of Paragraph II of the order which creates a limited exception to the order's provision that restricts Salomon's ability to limit the transshipment of its products. Salomon's Request was on the public record for thirty days and no comments were received.

After reviewing Salomon's request and other available information, the Commission has concluded that the public interest warrants reopening and modification of the order in the manner requested by Salomon. The transshipment and location restriction provisions of the order (subparagraphs I.B and I.C) were adopted principally as "fencing-in" restraints ancillary to the order's ban on resale price maintenance ("RPM"). Salomon has shown that it does not fix the prices at which its authorized dealers resell Salomon ski products, that Salomon ski product prices vary from dealer to dealer, and that the transshipment and location restriction provisions therefore have served their purpose to encourage the emergence of intrabrand price competition in Salomon products. To the extent that subparagraphs

I.B and I.C were intended as a remedy for the alleged anticompetitive effects of transshipment and location restrictions independent of RPM, the Supreme Court's ruling in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 26 (1977), constitutes a change in law that justifies reexamination of the provisions. Such a reexamination, based on the record presented by Salomon and other information, demonstrates that transshipment and location restraints by Salomon would pose no threat to interbrand competition.

Salomon's inability to ban transshipping and sales from unauthorized locations would likely cause Salomon significant competitive injury by, among other things, lessening the efficiency of Salomon's distribution system, discouraging dealers from remaining with Salomon, exposing Salomon's customers to increased risk of injury and, consequently, exposing Salomon to personal injury claims.

The transshipment and location restriction provisions in question appear to have served their remedial purpose. There is no indication that Salomon has engaged in RPM (or has breached the order's transshipping and location restriction provisions) from January 6, 1977, to date, and nothing in the record suggests that there is a need to continue the order's transshipment and location restriction provisions to ensure that RPM is not reinstituted by Salomon.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that subparagraphs I.B, I.C and Paragraph II of the order be, and they hereby are, deleted.

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9134. Complaint, April 29, 1980—Decision, Aug. 9, 1985*

This consent order requires Porter Realty, Inc. and Irvin Porter, among other things, to cease, in connection with the advertising or sale of land or the inducement of payments for land, representing that the purchase of any land is a sound financial investment; involves little monetary risk; is a way to achieve financial security; and will result in economic benefit to the purchaser stemming from an increase in the value of the land as a result of mineral rights, exploration, profitable resale or as a hedge against inflation. Respondents are prohibited from representing that any land is currently usable as a homesite, farm or ranch, unless that land is immediately usable for the cited purpose without any substantial improvement or development by the purchasers; and from misrepresenting in any manner the cost of obtaining or availability of electric power, telephone service, potable water, sewage disposal, or any utility; and any interest in land by respondents or others. Respondents are further required to prepare a "Fact Sheet" containing specified information and to distribute a copy to all purchasers in a prescribed manner. Advertisements, promotional material and sales presentations must include statements warning that investment is risky and that prospective buyers should consult a qualified professional before purchasing; and that substantial expenditures may be necessary to make lots suitable for use. Contracts must contain a seven-day right-to-cancel provision and a disclosure that refunds will be made within 30 days after the seller receives a cancellation notice. Additionally, respondents are required to provide consumers with cancellation forms; honor all valid cancellation requests; and make refunds in a timely manner. The order further requires that sales representatives receive a copy of the order; that respondents institute a surveillance program designed to reveal those who fail to comply with the provisions of the order and discontinue dealing with any person who engages in any prohibited act or practice.

Appearances

For the Commission: *Gary D. Kennedy.*

For the respondents: *Aninslee R. Ferdie, Ferdie & Gouz,* Coral Gables, Fla.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respond-

* Complaint previously published at 105 F.T.C. 7 (1985).

ents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Porter Realty, Inc. and Irvin Porter of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

(1) Respondent Porter Realty, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 717 Ponce de Leon Boulevard, in the city of Coral Gables, State of Florida.

(2) Respondent Irvin Porter is an officer or former officer of respondent, Porter Realty, Inc. During all relevant times, respondent Porter has formulated, directed, and controlled the policies, acts, and practices of said corporation, and his address is the same as that of said corporation.

(3) The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

As used in this order, the following definitions shall apply:

(A) *Respondents* means respondent Porter Realty, Inc., its successors and assigns, and its officers, directors, representatives and employees, or respondent Irvin Porter, or both, and any corporation, subsidiary, division, agent, or other device through which either corporate or individual respondent acts.

(B) *Seller* means one who owns and, directly or indirectly, sells, offers to sell, or advertises for sale any land.

(C) *Agent* means one who represents, or acts for or on behalf of, a

seller in selling, offering to sell, or advertising for sale any land, but shall not include an attorney at law whose representation of another person consists solely of rendering legal services.

(D) *Land, property,* or *lot* means any real property unimproved by a commercial or residential building sold, offered for sale, or advertised for sale by respondents, but shall not include any real property sold or offered for sale to a purchaser pursuant to a single contract for a sum in excess of $50,000.

(E) *Purchaser* or *buyer* means any individual who is a potential or actual vendee of the land offered for sale or sold by respondents.

(F) *Commission* means the Federal Trade Commission and/or its duly authorized representatives and employees.

(G) *Homesite* means any lot in which (1) potable water is available at a reasonable cost, (2) the lot is suitable for a septic tank or there is reasonable assurance that the lot can be served by a central sewage system, (3) the lot is legally accessible, and (4) the lot is free from periodic flooding.

I

It is ordered, That respondent Porter Realty, Inc., a corporation, its successors and assigns, and its officers, representatives, and employees, and Irvin Porter, individually and as an officer or former officer of said corporation, directly or through any corporation, subsidiary, division, agent, or other device, in connection with the advertising, marketing, offering for sale, sale, or inducement of payments for land, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of any land has been, is, or will be a good, profitable, short-term, safe, or sound financial investment;

2. There has been, is, or will be little or no financial risk involved in the purchase of any land;

3. The resale of any land is not or will not be difficult, or such land can be or has been resold within a certain time;

4. The purchase of any land is a way to achieve financial security or self-sufficiency, to deal with inflation, or to make money;

5. The value of, or demand for, any land has increased, is increasing, or will increase;

6. Purchasing any interest in land will result in any economic benefit to the purchaser, including but not limited to a benefit result-

ing from an increase in the value of the land from its use or development for any purpose, or as a result of mineral rights, exploration, or extraction; the land's profitable resale; the provision of a hedge against inflation; or the receipt of income or reduction of expenses from growing any crop, raising any animal, or any other source;

7. Any land is suitable for use as a homesite, farm, or ranch, for personal or commercial purposes;

unless such representation is not misleading and unless, at the time such representation is made, respondents possess and rely upon competent and reliable evidence which substantiates the representation, including, at a minimum, (a) data sufficient to demonstrate that the typical owner of such land is likely to achieve the results represented, and (b) where the representation predicts or projects future occurrences, evidence that would generally be accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection.

B. Failing to maintain evidence in support of and upon which respondents rely in making any representation about the value, suitability, or use of land, including evidence substantiating the representations described in Paragraph I.A., such evidence to be retained for three years from the date of respondents' last use of such representation and to be furnished to the Commission upon request.

C. Representing, directly or by implication, through the use of any means, that any land is currently usable as a homesite, farm, or ranch, unless such land is immediately usable for such purpose without any substantial improvement or development by the purchaser.

D. Misrepresenting in any manner:

1. The cost of obtaining or availability of electric power, telephone service, potable water, sewage disposal, or any utility;

2. The past, present, planned, proposed, or potential purchase, use, or development of any interest in land by respondents or any other party;

3. The extent, location, value, nature, or significance of any actual or potential mineral right or resource or any activity related thereto.

II

It is further ordered, That respondents, in connection with the advertising, marketing, offering for sale, or sale of land in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, shall:

A. Prepare a "Fact Sheet for Buyers" containing only such informa-

tion as is set forth or referred to in Attachment A to this order (incorporated herein by reference), and distribute to all purchasers a copy of the Fact Sheet in the following manner:

1. If respondents invite the purchaser by mail to attend a meeting sponsored by respondents, respondents shall include the Fact Sheet with the invitation;

2. If respondents arrange to meet with the purchaser in his or her home or other location, respondents shall mail the Fact Sheet to the purchaser, allowing sufficient time for the Fact Sheet to arrive at least two days prior to the meeting;

3. If the initial contact with the purchaser is in person (for example, at a booth located in a public place), respondents shall, after identifying briefly the purpose of the contact, give the Fact Sheet to the purchaser, request that he or she read it, and provide ample uninterrupted time for it to be read completely before continuing with any sales presentation;

4. If the initial contact is by telephone or the sale is to be completed entirely through the mail, the Fact Sheet shall accompany the initial mailing to the purchaser.

B. Refrain from misrepresenting any information in the Fact Sheet.

C. Refrain from making any representation, directly or by implication, through the use of any means, about:

1. The present, planned, proposed, or potential development, improvement, or facilities of the land or of the subdivision or project in which the land is located where such representation differs in any material respect from the information contained in the Fact Sheet or the Property Report required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. 1701 to 1720 (1982); 24 C.F.R.1700.1 *et seq.* (1983);

2. The respondents' or purchasers' rights or obligations where such representation differs in any material respect from the parties' rights or obligations as stated in the contract, the Fact Sheet, or the Property Report required by the Interstate Land Sales Full Disclosure Act and related regulations.

D. Where respondents are sellers, honor any purchaser's request to rescind the contract and recover all payments thereunder at the purchaser's option, if respondents fail to distribute a copy of the Fact Sheet to such purchaser as required by Paragraph II.A., provided that the purchaser makes such request within thirty days after receiving a copy of the Fact Sheet.

III

It is further ordered, That where respondents are sellers, in connection with the advertising, marketing, offering for sale, or sale of land in or affecting commerce as commerce is defined in the Federal Trade Commission Act, as amended, they shall:

A. Disclose clearly and prominently in every written promotional material, magazine or newspaper advertisement greater than one-quarter page, and oral sales presentation the following statements:

1. THE FUTURE VALUE OF LAND IS UNCERTAIN. THESE LOTS ARE NOT BEING SOLD AS A FINANCIAL INVESTMENT. YOU SHOULD NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. DISCUSS ANY POSSIBLE PURCHASE WITH A QUALIFIED PROFESSIONAL.

2. THESE LOTS MAY BE SUITABLE FOR USE ONLY WITH SUBSTANTIAL EXPENDITURES FOR THE EXTENSION OF UTILITIES, WATER, AND OTHER NECESSITIES. THESE EXPENDITURES VARY DEPENDING ON THE LOCATION OF THE LOT AND COULD BE SO GREAT AS TO MAKE USE OF THE LAND IMPRACTICAL.

B. Disclose clearly and prominently in every radio advertisement, television advertisement, and magazine or newspaper advertisement of one-quarter page or less the following statement:

REMEMBER—BUYING LAND MAY BE RISKY. CONSULT A QUALIFIED PROFESSIONAL BEFORE BUYING.

C. Include clearly and prominently, immediately preceding the space provided for the purchaser's signature in each contract for the sale of land, the following statement in 12-point boldface type:

SEVEN DAY RIGHT TO CANCEL

YOU HAVE THE RIGHT TO CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU SIGN THIS CONTRACT. SEE THE ATTACHED "RIGHT OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.

IF YOU CHOOSE TO CANCEL WITHIN THIS TIME, ANY PAYMENT YOU MADE UNDER THIS CONTRACT WILL BE REFUNDED AND ANY DOCUMENT YOU SIGNED WILL BE CANCELLED AND RETURNED WITHIN THIRTY DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

ATTENTION: ALTHOUGH YOU HAVE SEVEN DAYS IN WHICH

TO RECONSIDER YOU DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT, *BEFORE SIGNING,* YOU CONSIDER YOUR NEEDS CAREFULLY AND HAVE THIS CONTRACT AND THE ATTACHED NOTICE TO BUYERS REVIEWED BY A QUALIFIED PROFESSIONAL.

D. Furnish each purchaser, at or before the time the purchaser signs a contract for the sale of land, with two copies of a form, containing only such information as is set forth or referred to in Attachment B to this order (incorporated herein by reference), captioned in 12-point boldface type, "RIGHT OF CANCELLATION," and with all other writing in 10-point boldface type.

Provided, however, That if respondents fail to distribute the "RIGHT OF CANCELLATION" forms as required by this paragraph, the period during which the purchaser may cancel the contract shall be extended until seven days after the purchaser receives said "RIGHT OF CANCELLATION."

Provided further, That during the seven-day cancellation period after a purchaser's signing of a land purchase contract, respondents shall not initiate any contact or communication, personal, telephonic, or otherwise, with such purchaser, but if respondents initiate any such contact, the period during which the purchaser may cancel the contract shall be extended until thirty days after the date of purchase.

E. Honor any signed and timely exercise of a "RIGHT OF CANCELLATION" (or its functional equivalent) by the purchaser, and within thirty business days after the receipt of such notice of cancellation, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

F. Refrain from misrepresenting, soliciting, or obtaining any purchaser's assent to or otherwise imposing any condition, waiver, or limitation upon the right of a purchaser to cancel a transaction or receive a refund under any provision of this order or by any applicable statute or regulation.

IV

It is further ordered, That respondents shall, within thirty days of a request by the Commission, Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Sydney Gross, or Edwin Kritzler, furnish to such requester a list of the names and last known addresses for each purchaser of land in the subdivisions known as Southwest Sunsites, Green Valley Acres, and Green Valley Acres II who bought such land through respondents, insofar as this informa-

tion appears in files or records within respondents' custody and control.

Provided further, That whenever it appears that an address supplied by respondents is not a purchaser's correct present address and whenever a subsequent request for such purchaser's present address is made by the Commission, Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Sydney Gross, or Edwin Kritzler, respondents shall, within ten days of such request, make all reasonable efforts, including contacting credit bureaus, telephone and utility companies, county land records, and purchasers' relatives or representatives whose addresses are in respondents' files, to obtain the correct present address of such purchaser and furnish it to the requester.

V

It is further ordered, That respondents shall:

A. Forthwith deliver by certified mail or in person, a copy of this order to all present and future sales representatives and other employees, independent brokers, advertising agencies, and others who sell or promote the sale of land or who otherwise have contact with the public on behalf of respondents in connection with the sale of land.

B. Provide each person described in Paragraph V.A. with a form, to be returned to respondents, clearly stating that person's intention to conform his or her sales practices to the requirements of this order.

C. Inform each person described in Paragraph V.A. that respondents shall not use the services of any such person, unless such person agrees to and does file notice with respondents that he or she will conform his or her practices to the requirements of this order.

D. In the event such person will not agree to so file notice with respondents and to conform his or her practices to the requirements of this order, respondents shall not use the services of such person.

E. Inform the persons described in Paragraph V.A. that respondents are obligated by this order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this order, or who fail to adhere to the affirmative requirements of this order.

F. Institute a reasonable program of continuing surveillance adequate to reveal whether the practices of each person described in Paragraph V.A. conform to the requirements of this order, and promptly investigate and make good faith efforts to resolve any complaints about any such person received by respondents, and maintain

records of any such complaint, investigation, and disposition of the complaint for ten years from the date of the complaint, such records to be furnished to the Commission upon request.

G. Discontinue dealing with any person described in Paragraph V.A. who more than once engages on his or her own in the acts or practices prohibited by this order.

H. Forthwith deliver a copy of this order to each of respondents' subsidiaries.

I. Notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment, reorganization, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

J. Within sixty days after service upon it of this order and annually for three years thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Azcuenaga did not participate.

ATTACHMENT A

FACT SHEET FOR BUYERS

FACT SHEET CONCERNING: (insert name of subdivision)
NAMES OF SELLER/AGENT: (insert name of seller and agent)
EFFECTIVE DATE OF NOTICE: (insert date of notice)

IMPORTANT

YOU ARE ADVISED THAT THE FUTURE VALUE OF LAND IS UNCERTAIN. THESE LOTS ARE NOT BEING SOLD AS A FINANCIAL INVESTMENT. YOU SHOULD NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. IF YOU OFFER YOUR LOT FOR SALE, YOU MAY FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM, WHICH MAY INVOLVE AN EXTENSIVE SALES CAMPAIGN. REAL ESTATE BROKERS ALSO MAY NOT BE INTERESTED IN SELLING YOUR LOT OR LISTING IT FOR SALE.

YOU ARE ALSO ADVISED THAT THESE LOTS MAY BE SUITABLE FOR USE ONLY WITH SUBSTANTIAL EXPENDITURES FOR THE EXTENSION OF UTILITIES, WATER, AND OTHER NECESSITIES. THESE EXPENDITURES VARY DEPENDING ON THE LOCATION OF THE LOT AND COULD BE SO GREAT AS TO MAKE USE OF THE LAND IMPRACTICAL.

AS OF THE DATE OF THIS FACT SHEET, THE SELLER HAS SOLD _____ (insert number) LOTS IN _____ (insert name of subdivision). _____ (insert number) LOTS REMAIN UNSOLD AND AVAILABLE FOR SALE.

(In connection with any land for which federal property reports are *not* provided as required by the Interstate Land Sales Full Disclosure Act and related regulations, 15

U.S.C. §§1701 to 1720 (1982), 24 C.F.R. §§1700.1 et seq. (1983), provide the following information:)

THIS FACT SHEET PROVIDES IMPORTANT INFORMATION ABOUT THE VALUE OF THESE LOTS AND THE AVAILABILITY AND ESTIMATED COSTS TO YOU OF UTILITIES, WATER, AND OTHER NECESSITIES.

WATER

(Provide the following information regarding water services:

(a) the method of water service to be used;

(b) if individual wells are to be used: whether the seller is responsible for installing such wells; whether evidence exists that water can be found under every lot offered for sale; the estimated depth at which water can be found in the applicable area; the estimated cost of drilling a well for household purposes and for agricultural purposes if agricultural use is feasible; and whether and under what conditions a refund or exchange will be offered in the event a productive well cannot be installed;

(c) if water is to be provided by a central system: who is responsible for constructing such a system; the estimated amount of any construction costs or any connection or use fees to be paid by the purchaser, including the estimated cost of installing water mains to either the most remote lot in the subdivision or the lot the prospective purchaser is considering purchasing; the estimated service availability date of the water system; and, if the seller is responsible for constructing the system, whether a separate account or fund has been established to finance such construction and the extent of construction completed as of the date of the Fact Sheet.)

SEWER SERVICE

(Provide the following information about sewer service:

(a) the method of sewage disposal to be used;

(b) if sewage disposal is to be by septic tank or other individual system: whether the seller is responsible for installing the system; the estimated cost of the system; whether a permit is required for such a system; and whether and under what conditions a refund or exchange will be offered if the purchaser is unable to install a septic tank or other on-site sewage system;

(c) if sewage disposal is to be by a central treatment and collection system: who is responsible for constructing such a system; the estimated amount of any construction costs or any connection or use fees to be paid by the purchaser; the estimated service availability date of the system; and, if the seller is responsible for constructing the system, whether a separate account or fund has been established to finance such construction and the extent of construction completed as of the date of the Fact Sheet.)

ELECTRIC SERVICE

(Provide the following information about electric service:

(a) whether primary service lines have been extended in front of, or adjacent to, each lot;

(b) if not, the utility company's policy and charges for extension of primary lines, and the estimated cost for extending primary service to either the most remote lot in the subdivision or the specific lot the prospective purchaser is considering purchasing.)

TELEPHONE SERVICE

(Provide the following information about telephone service:

(a) whether primary service lines have been extended in front of, or adjacent to, each lot;

(b) if not, the utility company's policy and charges for extension of primary lines, and the estimated cost for extending primary service to either the most remote lot in the subdivision or the specific lot the prospective purchaser is considering purchasing.)

IMPORTANT: BEFORE SIGNING ANY DOCUMENT, OBTAIN AND READ THOROUGHLY THE CONTRACT AND THIS FACT SHEET. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THE TERMS OR MERITS OF THIS PURCHASE *BEFORE* YOU SIGN ANYTHING.

(In connection with any land for which federal property reports *are* provided as required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. §§1701 to 1720 (1982), 24 C.F.R. §§1700.1 et seq. (1983), provide the following information:)

IMPORTANT: BEFORE SIGNING ANY DOCUMENT, OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND CONTRACT. THE PROPERTY REPORT CONTAINS ADDITIONAL INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THE TERMS OR MERITS OF THIS PURCHASE *BEFORE* YOU SIGN ANYTHING.

ATTACHMENT B

RIGHT OF CANCELLATION

(insert date purchaser signed the contract)

Date of Transaction

(insert lot identification information)

Lot Identification

YOU HAVE THE RIGHT TO CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU SIGN THE CONTRACT. YOU SHOULD USE THIS TIME TO EXAMINE WITH CARE THIS CONTRACT AND THE FACT SHEET OR PROPERTY REPORT. WE ALSO RECOMMEND THAT YOU HAVE THIS CONTRACT AND OTHER INFORMATION ABOUT THE PROPERTY REVIEWED BY A QUALIFIED PROFESSIONAL.

NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS SEVEN DAY PERIOD. IF, HOWEVER, THE SELLER OR ITS REPRESENTATIVE CONTACTS YOU DURING THIS SEVEN-DAY PERIOD, YOU MAY CANCEL THE PURCHASE BY NOTIFYING THE SELLER BY MIDNIGHT OF THE THIRTIETH DAY AFTER THE DATE OF PURCHASE.

IF YOU CANCEL WITHIN THIS TIME, ANY PAYMENTS YOU MADE UNDER THE CONTRACT WILL BE REFUNDED AND ANY DOCUMENT YOU SIGNED WILL BE CANCELLED AND RETURNED WITHIN THIRTY DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

TO CANCEL THE TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE, OR ANY OTHER WRITTEN NOTICE OR TELEGRAM STATING YOU ARE EXERCISING YOUR RIGHT TO CANCEL, TO (insert name of seller), AT (insert address of seller's place of business) POSTMARKED (if mailed) OR FILED FOR TRANSMISSION (if telegraphed) NOT LATER THAN MIDNIGHT OF (insert date not earlier than the seventh day following the date the purchaser signed the contract).

I (WE) HEREBY CANCEL THIS TRANSACTION. (EACH BUYER MUST SIGN THIS NOTICE.)

_____

(Date)

_____ _____

(Buyer's signature) (Buyer's signature)

IN THE MATTER OF

WEIN PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3160, Complaint, Aug. 13, 1985—Decision, Aug. 13, 1985

This consent order requires four California firms and two individuals engaged in the advertising, sale and distribution of "DECIMATE", an ultrasonic pest control product, among other things, to cease representing that DECIMATE or any other ultrasonic pest control product will eliminate cockroaches, rats, mice, or other such pests from a home or place of business; will eliminate them within a specified period of time; will protect a home or place of business from rodent and insect infestations or cause any area to be free of such pests; and will serve as an effective alternative to the use of conventional pest control products. The firms are also barred from making any performance or effectiveness claims for ultrasonic pest control devices unless they possess and rely upon proper substantiating evidence when making those claims.

Appearances

For the Commission: *Harrison J. Sheppard.*

For the respondents: *Joseph W. Price, Price, Gess & Ubell,* Newport Beach, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wein Products, Inc., a corporation, El Mar Trading Corporation, a corporation, El Mar Corporation, a corporation; Stanley Weinberg, individually and as an officer and director of Wein Products, Inc.; and Allen Schor, individually and as an officer and director of El Mar Trading Corporation and El Mar Corporation, all of which corporate and individual respondents are hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wein Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of California, with its offices and principal place of business located at 115 W. 25th Street, Los Angeles, California.

Respondents El Mar Trading Corporation and El Mar Corporation are corporations organized, existing, and doing business under and by virtue of the laws of the State of California, with their offices and principal place of business located at 821 E. Artesia Boulevard, Carson, California.

Respondent Stanley Weinberg is an officer and director of Wein Products, Inc. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

Respondent Allen Schor is an officer and director of El Mar Trading Corporation and El Mar Corporation. He formulates, directs and controls the policies, acts and practices of said corporations, including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents manufacture, advertise, offer for sale, sell and distribute ultrasonic pest control products under the brand name of "DECIMATE". Wein Products, Inc. is the manufacturer of the DECIMATE and El Mar Trading Corporation and El Mar Corporation are the sole distributors for the product.

PAR. 3. Respondents, at all times mentioned herein, have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the DECIMATE ultrasonic pest control product, respondents have disseminated, directly and through their marketers and distributors, various promotional materials, including suggested advertisements, sales brochures and promotional pamphlets, which contain statements respecting the performance of the DECIMATE ultrasonic pest control product. Examples of such promotional materials are attached hereto as Exhibits A through E.

PAR. 5. Typical statements in said promotional materials, but not necessarily inclusive thereof, are:

A. DECIMATE is the safest, most effective and most economical method yet devised for the control and elimination of common household pests. . . .Now, scientific research has proven that high intensity ultrasonic sound waves are effective in ridding an area of many types of pests, including rats, roaches, mice and mosquitoes.

B. In four to six weeks your home will be free of pests, without the use of possible cancer-causing chemicals and pesticides.

C. Say Goodbye to roaches, rodents, mosquitoes, crickets and other household pests without toxic chemicals.

D. Effective—eliminates pests from your home in 4–6 weeks or sooner in an open space up to 2000 sq. ft.

E. Proven effective against rats, roaches, fleas, flies, mice, spiders, and many more pests.

F. Finally! An economical, effective solution to your pest problem. Would you believe it if someone told you you could make one purchase that would keep your home or business free of pests for years to come and yet cost only pennies a day? Believe it—DECIMATE works! And without dangerous poisons or toxic chemicals.

G. . . . will have no effect on your home except to rid it of insects and rodents.

H. DECIMATE THE POWERFUL . . . ULTRASONICALLY ELIMINATES INSECTS AND RODENTS.

PART I

Pest Elimination Claims

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 6. Through the use of statements referred to in Paragraph Five and others not specifically set forth therein, respondents have represented, and are now representing, directly or by implication, that use of the DECIMATE:

1. Eliminates rats, mice, cockroaches, and other pests from a purchaser's home or place of business.

2. Eliminates rodent and insect problems from a purchaser's home or place of business within four to six weeks or sooner.

3. Prevents rodents and insects from remaining in or entering an area in a purchaser's home or place of business where the DECIMATE device is in use.

PAR. 7. In truth and in fact, use of the DECIMATE does not:

1. Eliminate unwanted rats, mice, cockroaches, or other pests from a purchaser's home or place of business.

2. Eliminate rodents or insects from a purchaser's home or place of business within four to six weeks or sooner.

3. Prevent rodents or insects from remaining in or entering an area in a purchaser's home or place of business in which such product is in use.

Therefore, the representations set forth above were, and are, false and misleading.

PART II

Claims of Ability To Control Pests

Alleging further violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 8. Through the use of the statements referred to in Paragraph Five, and others not expressly set out therein, respondents have represented, and are now representing, directly or by implication, that use of the DECIMATE:

1. Effectively controls rats and mice in the home or place of business.

2. Effectively controls insects, such as cockroaches, in the home or place of business.

3. Eliminates the need to use, in the home or place of business, alternative rodent or insect control products such as traps, powders, sprays or other chemicals.

PAR. 9. In truth and in fact, use of the DECIMATE:

1. Is ineffective for controlling rodents in the home or place of business. Any reaction by rodents to the DECIMATE would, at best, only be of short duration. Rodents habituate to ultrasound and will return to their chosen nesting or feeding habitats even in the presence of such ultrasonic products.

2. Is ineffective for controlling insects in the home or place of business.

3. Does not eliminate the need to use alternative pest control products such as chemicals, sprays, powders, or traps in the home or place of business.

Therefore, the representations set forth above were, and are, false and misleading.

PART III

Area Coverage Claims

Alleging further violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 10. Through the use of the statements referred to in Paragraph Five, and others not expressly set out therein, respondents have represented, and are now representing, directly or by implication, that use of the DECIMATE will effectively cover an area of up to 2000 to 3500 square feet in the home or a place of business.

PAR. 11. In truth and in fact, the DECIMATE will not effectively

cover areas of up to 2000 to 3500 square feet in the home or place of business because, among other reasons, ultrasound:

1. loses intensity as it travels;
2. is absorbed by soft objects such as carpeting, curtains and drapes;
3. is reflected by hard surfaces such as partitions, appliances, furniture, cabinets and shelving, creating sound "shadows;" or
4. is unable to penetrate to places of nesting and feeding that are behind and within recesses of walls, under floors or within cracks or crevices.

Therefore, the representations set forth above were, and are, false and misleading.

PART IV

Reasonable Basis—Substantiation

Alleging further violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference herein.

PAR. 12. Through the use of the statements referred to in Paragraph Five, and others not expressly set out therein, respondents have represented and are now representing, directly or by implication, that at the time of making the representations respondents possessed and relied upon a reasonable basis for those representations.

PAR. 13. In truth and in fact, at such times, respondents did not possess and rely upon a reasonable basis for making those representations.

Therefore, the representations set forth above were, and are, false and misleading.

PAR. 14. The use by respondents of the aforesaid representations as set forth in Parts I- IV, and the placement in the hands of distributors and retailers of promotional materials through which others may have conveyed those representations have had the tendency and capacity to mislead consumers and to induce the purchase of respondents' ultrasonic pest control products.

PAR. 15. The acts and practices of respondents, as herein alleged, constituted, and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

APPENDIX A

DECI-MATE

ULTRASONIC PEST REPELLE

INTRODUCTION

DECI-MATE is the safest, most effective and most economical method yet devised for the control and elimination of common household pests.

In recent years, many giants of the Food Preparation Industry have come to rely on the power of Ultrasonic Sound Waves as the solution to the enormous pest problems they face. Now, because of technological breakthroughs in design and manufacturing techniques, this method is available to everyone at affordable prices.

Until very recently, the primary way man has dealt with pests has been through the use of chemical poisons. While chemical erradication can be immediately effective, it can also be toxic to humans and animals. Now scientific research has proven that high intensity ultrasonic sound waves are effective in ridding an area of many types of pests, including rats, roaches, mice and mosquitoes.

This non-toxic but slower method of erradication has no effect on humans, but in a few short weeks, will effectively repel many types of pests from a given area. The constant pulsing of DECI-MATE will force these pests to give up their source of food, water and shelter. It must be stressed that the effect is a gradual one as the creatures will withstand tremendous nervous system abuse before leaving.

NOTE: Certain pests are more susceptable to ultrasound during specific stages of their life cycle. Eggs and larvae are not affected.

HOW IT WORKS

DECI-MATE's solid state circuitry delivers a tremendous blast of power to a special ultrasonic driver that produces 150 decibels of ultrasound pressure level. The circuitry then sweeps the ultrasonic waveform from 25KHz to 65KHz. This tremendous blast of ultrasonic energy dramatically disturbs pests' eating, sleeping and reproducing patterns. Because the waveform is continuously and automatically variable, pests have no way to develop immunity to ultrasound. In four to six weeks your home will be free of pests, without the use of possible cancer-causing chemicals and pesticides. This is an ideal method for allergy sufferers or anyone who wants an environmentally safe method of erradication.

Do not expect pests to leave on first exposure but rely on the tremendous power of your DECI-MATE to produce what scientists refer to as "NEGATIVE PHONOTAXIS" in the pest. Pests will suffer from continual discomfort while the DECI-MATE is turned on.

INSTALLATION

Installation is simple. Just plug DECI-MATE into any convenient 110 volt household outlet and it begins to work immediately.

MAINTENANCE

DECI-MATE's Solid State Circuitry is designed to give you years of maintenance-free operation at less than a penny a day. Just take care that the unit does not come into contact with water. Total power consumed by DECI-MATE is less than half of a nite lite.

APPENDIX B

FINALLY!

An Economical, Effective Solution To Your Pest Problem.

Would you believe it if someone told you you could make one purchase that would keep your home or business free of pests for years to come and yet cost only pennies a day? Believe it — DECI-MATE works! And without dangerous poisons or toxic chemicals. The amazing DECI-MATE is completely safe for your family and most domestic and commercial animals. This could be the last dollar you spend on pest control!

Proven Effective Against:

Rats, Roaches, Fleas, Flies, Mice, Spiders, and many more pests.

Guaranteed

Each unit is warranteed for a full year against defects and has a 30 day money-back guarantee.

DECI-MATE™

ULTRASONIC PEST REPELLER

APPENDIX C

DECO-MATE

ULTRASONIC PEST REPELLER

SAY GOOD BYE TO ROACHES, RODENTS, MOSQUITOS, CRICKETS AND OTHER HOUSEHOLD PESTS WITHOUT TOXIC CHEMICALS

SAFE, CLEAN, ELECTRONICALLY ULTRASONICALLY

- Safe for people, dogs and cats.
- Uses less energy than a nite lite.
- Ideal for home, apartment, hospital, store, warehouse: wherever pests can find food or shelter.
- Up to 100 times more powerful than any other comparable product on the market today. Covers up to 2,000 sq. ft.

EL MAR TRADING CORP. Carson, CA 90746

APPENDIX D

DECI-MATE
DECI-MATE
SAFE—Not harmful to your health, your family, or your home.
EFFECTIVE—Eliminates pests from your home in 4-6 weeks or sooner, in an open space up to 2,000 sq. ft.
ECONOMICAL—DECI-MATE is a one time investment that protects your home a year round while using less than half the energy of a single 60-watt bulb.
DECI-MATE—Replaces Exterminator and chemical treatments in the pest control program.
PERFORMANCE WARRANTEE
DECI-MATE

APPENDIX E

DEC-O-MATE
The POWERFUL
Safe Around Children and Pets
AUTOMATIC VARIABLE FREQUENCY
ULTRASONIC LEVEL WAVES
INSECTS AND RODENTS
CAUTION

Decision and Order

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wein Products, Inc., is a California corporation with its offices and principal place of business located at 115 W. 25th Street, Los Angeles, California.

Respondents El Mar Trading Corporation and El Mar Corporation are California corporations with their offices and principal place of business located at 821 E. Artesia Boulevard, Carson, California.

Respondent Stanley Weinberg is an officer and director of Wein Products, Inc.

Respondent Allen Schor is an officer and director of the El Mar corporations.

As such, the individual respondents formulate, direct and control the policies, acts and practices of said corporations, and their business addresses are the same as those for said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Wein Products, Inc., a corporation, El Mar Trading Corporation, a corporation, and El Mar Corporation, a corporation, their successors and assigns, and their officers; Stanley Weinberg, individually and as an officer and director of Wein Products, Inc.; and Allen Schor, individually and as an officer and director of El Mar Trading Corporation and El Mar Corporation; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the "Decimate" or any other ultrasonic pest control product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the Decimate or any other ultrasonic pest control product will:

(1) eliminate cockroaches, rats, mice or other pests from a home or place of business;

(2) eliminate rodents or insects from a home or place of business within two to six weeks, or within any other specified period of time;

(3) protect an area where said product is in use in a home or place of business from rodents or insects, or will cause an area to be free of rodents or insects;

(4) protect, from rodent or insect infestations areas up to 2000 square feet in a home or place of business, or in any other specified square footage area; or

(5) serve as an effective alternative to the use of conventional products such as sprays, powders, traps or other chemicals in providing protection from insect and rodent infestation.

B. Representing, directly or by implication, any performance characteristic of any ultrasonic pest control product, unless at the time of making such representation respondents possess and rely upon competent and reliable evidence which substantiates the representation. Evidence in the form of tests, experiments, analyses, research studies, or other evaluations shall be competent and reliable only if they are conducted in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant professions or sciences to yield accurate, reliable, and reproducible results.

C. Representing, directly or by implication, that any ultrasonic pest control product is effective in providing protection from insect or rodent infestation in a home or place of business unless at the time

of making such representation respondents possess and rely upon competent and reliable evidence which either directly relates to such home or place of business use conditions, or which can properly be applied to such conditions. Evidence in the form of tests, experiments, analyses, research studies, or other evaluations shall be competent and reliable only if they are conducted in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant professions or sciences to yield accurate, reliable, and reproducible results.

II

It is further ordered, That for a period of three (3) years after the last date of dissemination of any representation concerning the performance characteristics or efficacy of any product covered by this order, respondents shall maintain and upon request make available to the Commission for inspection and copying copies of all materials relied upon to substantiate the representation, and copies of all documents in respondents' possession that contradict, qualify, or otherwise call into question said representation, including complaints from consumers.

III

It is further ordered, That respondents shall for a period of three (3) years distribute, or cause to be distributed, a copy of this order to all present and future managerial employees, distributors, independent sales agents, and direct purchasers.

IV

It is further ordered, That for a period of ten years:

A. Corporate respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents that may affect compliance obligations arising out of this order, such as dissolution, assignment of the ultrasonic pest control business, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

B. Respondent Allen Schor shall promptly notify the Commission of the discontinuance of his present business or employment in connection with the marketing of ultrasonic pest control products and of his affiliation with any new business or employment in the ultrasonic pest control business, stating the nature of the business or employ-

ment in which he is newly engaged, as well as a description of his duties and responsibilities in connection with such new ultrasonic pest control business or employment and the address of such new business or employment.

V

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

LOUISIANA STATE BOARD OF DENTISTRY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9188. Complaint, Oct. 29, 1984—Decision, Aug. 26, 1985

This consent order requires the Louisiana State Board of Dentistry (the Board), the sole licensing authority for dentists in Louisiana, among other things, to cease adopting or maintaining any rule, regulation, policy or course of conduct that would tend to prevent or hinder the advertising or publishing of pricing discounts for dental products and services. The Board is also barred from prohibiting any dentist or dental organization from advertising the availability of a discounted price; taking or threatening to take disciplinary action against advertisers of such prices; declaring the publication of discounted prices to be illegal, unethical, unprofessional or otherwise improper; and inducing or encouraging any individual or organization to take any of the actions prohibited by the order. The Board is additionally required to distribute a copy of the order and an explanatory announcement to all dentists licensed to practice in Louisiana; and provide such material to all those applying for a license for a period of two years.

Appearances

For the Commission: *Elizabeth R. Hilder* and *Oscar M. Voss.*

For the respondent: *John Gallagher, Jr.* and *Guy Wootan, Wootan, Hennen, Pelayo & Gallagher,* New Orleans, Louisiana and *Phillip A. Wittmann* and *Stephen G. Bullock, Stone, Pigman, Walther, Wittmann & Hutchinson,* New Orleans, Louisiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

Respondent

1. Respondent Louisiana State Board of Dentistry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the State of Louisiana (Louisiana Revised Statutes Section 37:751 *et seq.*), with its principal office at Ten-O-One Howard Avenue, Suite

4308, New Orleans, Louisiana. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

2. The Board is composed of nine dentists and one dental hygienist, as provided in La. Rev. Stat. Section 37:753.

3. While serving their membership terms, dentist members of the Board may, and do, continue to engage in the business of providing dental care services for a fee. Compensation for serving on the Board is limited to fifty dollars per day and necessary traveling expenses for each day actually engaged in the duties of Board membership, and is paid out of fees collected by the Board.

4. The licensed dentists in each of the eight Louisiana congressional districts select from among themselves nominees for appointment to the Board. The Governor of Louisiana appoints from the nominees of each congressional district one dentist to represent each district. The Governor appoints a ninth dentist as an at large member.

5. The Board is the sole licensing authority for dentists in Louisiana. It is unlawful for individuals to practice or to offer to practice dentistry in Louisiana unless they hold a current license to practice issued by the Board.

6. The Board is authorized by Louisiana law, La. Rev. Stat. Section 37:776(15), to take disciplinary action against any licensee who engages in unprofessional conduct as defined in La. Rev. Stat. Section 37:775. Disciplinary action by the Board may include the suspension or revocation of a license, or the imposition of a fine, probation, or other limitations or restrictions on a licensee.

7. The dental hygienist serving on the Board may vote only on matters pertaining to the profession of dental hygiene. Board actions pertaining to dentists in the State of Louisiana are decided by nine dentists, each of whose principal occupation is the private practice of dentistry.

Trade and Commerce

8. Except to the extent that competition has been restrained as alleged below, and depending on their specialties and geographic location, dentists in Louisiana compete with each other and with dentists serving on the Board.

9. There are more than 1800 dentists practicing in Louisiana. More than $200 million is spent on dental care annually in Louisiana by Louisiana residents, governmental entities, and private third-party payors.

10. In the conduct of their businesses, dentists in Louisiana receive and treat patients from other states, receive substantial sums of money that flows across state lines from the federal government and

from private insurers for rendering dental services, prescribe or administer medicines that are shipped in interstate commerce, and use supplies and equipment that are shipped across state lines. The acts and practices described below are in interstate commerce, or affect the interstate activities of dentists in Louisiana and third parties who pay for dental services, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

State Regulation of Dental Advertising

11. The State of Louisiana does not ban truthful price advertising by dentists.

a. In 1940, the Louisiana legislature enacted La. Rev. Stat. Section 37:775 defining unprofessional conduct by dentists, and included provisions prohibiting the advertising of prices for dental services and any other advertising by dentists other than publication of a professional card. La. Rev. Stat. Section 37:775(8) and (14).

b. In February 1978, following the United States Supreme Court's decision in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the Louisiana Attorney General issued an opinion letter declaring that the prohibition on price advertising by dentists "denies the public of its right to receive vital information guaranteed by the free speech provisions of the First Amendment to the United States Constitution," and that "any attempt to enforce [La. Rev. Stat. Sections] 37:775 and 776 . . . against truthful and informative advertising would be subject to constitutional attack and, in our opinion, [would be] in bad faith."

c. In December 1978, the United States District Court for the Eastern District of Louisiana held that truthful newspaper advertising concerning the availability or cost of routine dental services is commercial speech protected by the First Amendment, and that La. Rev. State. Section 37:775(8) and (14), and La. Rev. Stat. Section 37:776(12) [now Section 37:776(15)], are unconstitutional to the extent that they restrict such advertising. *Dewey v. Louisiana State Board of Dentistry,* 491 F.Supp. 132 (1978), *aff'd per curiam,* 625 F.2d 499 (5th Cir. 1980).

12. The statutes of Louisiana now in effect do not prohibit dentists from offering or truthfully advertising discounts from their usual fees. The State of Louisiana has no established or articulated policy of restricting dentists from offering or advertising discounts from their usual fees.

Board Conduct

13. The Board has restrained competition among dentists in Louisiana by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination by dentists of truthful information about the prices of their services. In particular, since at least February 1982, respondent has combined or conspired to:

a. Prohibit licensed dentists from truthfully advertising discounts from their usual fees; and

b. Coerce individual dentists into abandoning their efforts to advertise truthful information about discounts from their usual fees.

14. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. The Board, since at least February 1982, has prohibited advertising by dentists of discounts from their usual fees, without regard to the truth or falsity of the advertising, on the purported ground that such advertising violates a Louisiana statutory provision that declares the advertisement of free dental services as an inducement to secure dental patronage to be unprofessional conduct (La. Rev. Stat. Section 37:775(7));

b. The Board has intimidated dentists who advertised discounts from their usual fees by sending them letters signed by the Board's attorney stating that such advertising is unprofessional conduct and therefore grounds for suspension of a dental license under La. Rev. Stat. Section 37:776(15), and demanding that they file a written statement with the Board promising to cease advertising discounts;

c. The Board has coerced dentists who advertised discounts from their usual fees into ceasing such advertising, including a group of dentists who advertised in August 1983, a "Back to School Special" offering cleaning, examination, flouride treatment, and bitewing x-rays for a specified price;

d. In August 1983, the Board brought disciplinary proceedings under La. Rev. Stat. Section 37:776(15) against, and imposed a fine and a public reprimand on, a dentist for advertising a discount from his usual fees on the ground that his advertising of a discount constituted unprofessional conduct; and

e. The Board has taken the above actions with knowledge that restriction by the Board of truthful advertising of the cost and availability of routine dental services violates the United States Constitution, and, in particular, that use of La. Rev. Stat. Section 37:776(15) to restrict such advertising was held unconstitutional in *Dewey v.*

Louisiana State Board of Dentistry, 491 F.Supp. 132 (1978), *aff'd per curiam,* 625 F.2d 499 (5th Cir. 1980).

Effects

15. The effects of the combination or conspiracy described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

a. Price competition among dentists for patients is being unreasonably restrained;
b. Consumers of dental care services are being deprived of the benefits of vigorous price competition among dentists; some consumers have paid higher prices for dental care and some consumers have delayed or foregone needed dental care;
c. Dentists are being prevented from disseminating truthful information about their fees, and restrained in their ability to make dental care services fully and readily available to consumers needing such services, including, for example, services provided through innovative dental care financing arrangements that involve discounting of fees; and
d. Consumers are being deprived of truthful information about dentists' fees, such as information about dentists' offering of discounts to the elderly or others.

Violation

16. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against the Board.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission

by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Louisiana State Board of Dentistry is organized, exists, and transacts business under the laws of the State of Louisiana, with its principal office at Ten-O-One Howard Avenue, Suite 4308, in the City of New Orleans, State of Louisiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For the purposes of this order, the following definitions shall apply:

A. *Board* shall mean the Louisiana State Board of Dentistry, its officers, committees, representatives, agents, employees, and successors.

B. *Discounted price* shall mean a price offered or charged by a person or organization for any dental product or service that is less than the price the person or organization usually offers or charges for the product or service. Products or services expressly offered free of charge shall not be deemed to be offered at a *discounted price.*

C. *Price advertising* shall mean advertising or publishing information about the price of any dental product or service. It shall not include express offers to provide a product or service free of charge.

D. *Disciplinary action* shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice dentistry in Louisiana, or the imposition of a reprimand, fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any device:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising the availability of, offering, or publishing a discounted price, or otherwise engaging in price advertising. Such conduct includes, but is not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit any person or organization from advertising the availability of, offering, or publishing discounted prices;

2. taking or threatening to take any disciplinary action against any person or organization for advertising the availability of, offering, or publishing discounted prices; and

3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper practice for any person or organization to advertise the availability of, offer, or publish discounted prices; and

B. Inducing, urging, or encouraging any dentist, group of dentists, or dental association to take any of the actions prohibited by this Part.

Provided, That nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, including reasonable affirmative disclosure requirements, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the meaning of Louisiana Revised Statutes Sections 37:775(3), 37:776(12), 37:776(16) or any Louisiana statutory provision governing dental advertising enacted subsequent to the date this Order becomes final, as limited by the First and Fourteenth Amendments to the United States Constitution.

In particular, nothing in this order shall prevent the Board from finding to be fraudulent, false, deceptive, or misleading:

a. advertising by a dentist in which a price is represented to be a discounted price when in fact it is the customary or usual price charged by that dentist;

b. advertising by a dentist of a discounted price for a dental service and failing to provide the same quality and components of service at the discounted price that are normally provided at the regular, non-discounted price for that service; and

c. a dentist's failure to disclose the expiration date of an advertised

discount offer if the dentist fails to make the discounted price available for a reasonable period of time from publication of the offer.

III.

It is further ordered, That this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of dentistry as defined in Louisiana Revised Statutes Sections 37:751 *et seq.*

IV.

It is further ordered, That the Board shall:

A. Distribute by mail an announcement in the form shown in Appendix A, and a copy of this order:

1. to each person licensed to practice dentistry in Louisiana, and to each person who has at the time this order becomes final a pending application for such a license, within sixty (60) days after this order becomes final; and

2. for a period of two (2) years after this order becomes final, to each person who hereafter applies for a license to practice dentistry in Louisiana, within sixty (60) days after he or she applies for the license;

B. Within one hundred twenty (120 days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order;

C. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including records of rulemaking and enforcement proceedings, and written communications, and any summaries of oral communications, to or from the Board regarding the advertising of the availability of, or the offering or publishing of, discounted prices, or other price advertising.

D. In addition to the report required by Part IV.B., at such times as the Commission may by written notice to the Board reasonably require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order; and

E. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of dentistry in Louisi-

ana that may affect compliance obligations arising out of this order, such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Louisiana State Board of Dentistry has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit dentists from advertising the availability of discounts from their usual fees, or otherwise restrict price advertising for dental services or products, except as provided below. In particular, with respect to advertising of discounts, the Board may not (1) adopt rules, regulations, or policies prohibiting the advertising of discounted prices for dental care, (2) take disciplinary action (such as the imposition of a fine, or the suspension or revocation of a dental license) or threaten disciplinary action against dentists who so advertise, or (3) declare it to be illegal or unethical for dentists to so advertise, except as provided below. The Board is also prohibited from encouraging any dentist or dental association to take actions that the order prohibits the Board from taking.

The order does not affect the Board's authority to prohibit, and discipline dentists for, (1) advertising free dental services or examinations as an inducement to secure dental patronage (which is expressly prohibited by Louisiana law), or (2) advertising that is fraudulent, false, deceptive, or misleading. Furthermore, the order does not affect the Board's authority to adopt and enforce reasonable affirmative disclosure requirements to prevent advertising that the Board reasonably believes is fraudulent, false, deceptive, or misleading.

In particular, the order provides that the Board may find to be fraudulent, false, deceptive, or misleading:

a. advertising by a dentist in which a price is represented to be a discounted price when in fact it is the customary or usual price charged by that dentist;

b. advertising by a dentist of a discounted price for a dental service and failing to provide the same quality and components of service at the discounted price that are normally provided at the regular, nondiscounted price for that service; and

c. a dentist's failure to disclose the expiration date of an advertised discount offer if the dentist fails to make the discounted price available for a reasonable period of time from publication of the offer.

For more specific information, you should refer to the attached FTC order.

President
Louisiana State Board of Dentistry

IN THE MATTER OF

KAISER ALUMINUM & CHEMICAL CORPORATION

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9080. Complaint, April 27, 1976—Dismissal Order, Aug. 27, 1985

The Federal Trade Commission has dismissed a complaint that charged Kaiser Aluminum & Chemical Corp. substantially lessened competition in the basic refractories industry by acquiring two basic refractories plants from International Mineral and Chemical Corp.'s Lavino Division. After the Commission placed a consent agreement with respondent that would settle the charges on the public record for comment (50 FR 19697), Kaiser sold all of its basic refractories plants to other companies and indicated that it has no indication of remaining in the business. As a result, the Commission has determined that it is in the public interest to reject the consent agreement and dismiss the complaint.

COMPLAINT

The Federal Trade Commission having reason to believe that Kaiser Aluminum and Chemical Corporation, a corporation subject to the jurisdiction of the Commission, has acquired the two operating basic refractory plants, inventory and related assets of the Lavino division of International Minerals and Chemical Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and/or Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) *Basic refractories* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof.

(b) *Basic refractory bricks and shapes* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof and which are formed during manufacture into bricks and other special shapes.

(c) *Basic refractory specialties* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof and which are sold in a "bulk" or non-shaped form.

II. KAISER ALUMINUM & CHEMICAL CORPORATION

1. Respondent Kaiser Aluminum and Chemical Corporation (hereinafter "Kaiser") is now and was at the time of the acquisition hereinafter described a Delaware corporation with its principal office and place of business at 300 Lakeside Drive, Oakland, California.

2. Kaiser is a fully-integrated aluminum producer and a highly-diversified industrial corporation engaged in a number of enterprises including, but not limited to, the production of agricultural chemicals, industrial chemicals, refractories materials and strontium products. In addition, Kaiser is engaged in commodities trading and owns fifty percent of Kaiser Aetna, a large real estate development firm. Kaiser also is engaged in mining or manufacturing in more than a dozen other countries. Kaiser Steel Corporation, an affiliated corporation of Kaiser, is a major consumer of basic refractories and is supplied primarily by Kaiser.

3. In 1973, Kaiser and its subsidiaries had total sales and revenues of $1.28 billion, net income before extraordinary items of $66.54 million, and total assets of $1.81 billion. Kaiser was ranked by Fortune magazine as the 133rd largest in sales and 67th largest in assets in 1973 among the nation's industrial corporations.

4. Kaiser, prior to the acquisition, operated seven refractory plants in the United States and, in whole or in part, owned six additional plants located in as many other countries.

5. Prior to and since the acquisition Kaiser has been a leading domestic supplier of refractories to the steel, cement and glass industries.

6. In 1973, Kaiser had total domestic refractory shipments of $65.8 million, representing 8.4% of the total United States shipments of refractory products.

7. In 1973, Kaiser had total domestic basic refractory sales of $38.5 million, representing 15.7% of the total United States sales of basic refractory products and ranked number two among the nation's basic refractory producers.

8. In 1973, Kaiser had total domestic basic refractory bricks and shapes sales of $21.4 million, representing 12.2% of the total United States basic refractory bricks and shapes sales and ranked number five among the nation's basic refractory bricks and shapes producers.

9. In 1973, Kaiser had total basic refractory specialties sales of $17.1 million, representing 24.4% of the total United States basic refractory specialties sales and ranked number one among the nation's basic refractory specialtites producers.

10. At all times relevant herein, Kaiser sold and shipped the relevant products throughout the United States and was and is now

engaged in commerce as "commerce" is defined in the amended Clayton Act and in the amended Federal Trade Commission Act.

III. THE ACQUISITION

11. On February 28, 1974, Kaiser, at a cost of $16.9 million, acquired two basic refractory plants and related assets located at Plymouth Meeting, Pennsylvania and Gary, Indiana. These facilities comprised the Lavino Division of International Minerals and Chemical Corporation (hereinafter "Lavino").

IV. LAVINO

12. In 1973 Lavino had refractory shipments of $27.7 million representing 3.7% of the total United States shipments of refractory products.

13. In 1973 Lavino had basic refractory sales of $27.7 million representing 11.3% of the total United States basic refractories sales and ranked number three among the nation's basic refractory producers.

14. In 1973 Lavino had basic refractory bricks and shapes sales of $25.5 million representing 14.5% of the total United States bricks and shapes sales and ranked number two among the nation's basic refractory bricks and shapes producers.

15. In 1973, Lavino had basic refractory specialties sales of $2.2 million representing 3.1% of the total United States basic refractory specialties sales and ranked number five among the nation's basic refractory specialty producers.

16. At all times relevant herein Lavino sold and shipped the relevant products throughout the United States and was engaged in commerce as "commerce" is defined in the amended Clayton Act and in the amended Federal Trade Commission Act.

V. TRADE AND COMMERCE

17. The relevant geographic market is the United States as a whole.

18. The relevant product market is the manufacture and sale of basic refractories. The relevant product submarkets are:

(a) manufacture and sale of basic refractory bricks and shapes and
(b) manufacture and sale of basic refractory specialties.

A. *Basic Refractories Market*

19. Trade and commerce in the sale of basic refractories in the United States is substantial, with 1973 sales amounting to $245.8 million.

20. In 1973, prior to the acquisition, concentration in the manufac-

ture and sale of basic refractories was high with the top four firms accounting for 57% of sales and the top eight accounting for 86%.

21. By virtue of the acquisition of Lavino, Kaiser controlled facilities which accounted for 26.9% of the 1973 sales of basic refractories and became *pro forma* the leading manufacturer of basic refractories in that year.

22. On a *pro forma* basis the acquisition of Lavino by Kaiser increased the 1973 four-firm concentration from 57% to 66% and eight-firm concentration from 86% to 90% in sales of basic refractories.

23. There have been no new entrants into the manufacture and sale of basic refractories since 1962.

24. Barriers to entry into the manufacture and sale of basic refractories are high and are increasing.

B. *Basic Refractory Bricks and Shapes*

25. Trade and commerce in the sale of basic refractory bricks and shapes in the United States is substantial, with 1973 sales amounting to $175.7 million.

26. In 1973, prior to the acquisition, concentration in the manufacture and sale of basic refractory bricks and shapes was high with the top four firms accounting for 66% of sales and the top eight accounting for 94%.

27. By virtue of the acquisition of Lavino, Kaiser controlled facilities which account for 26.7% of the 1973 sales of basic refractory bricks and shapes and became *pro forma* the leading manufacturer of basic refractory bricks and shapes in that year.

28. On a *pro forma* basis the acquisition of Lavino by Kaiser increased the 1973 four-firm concentration from 66% to 79% and eight-firm concentration from 94% to 96% in sales of basic refractory bricks and shapes.

29. There have been no new entrants into the manufacture and sale of basic refractory bricks and shapes since 1962.

30. Barriers to entry into the manufacture and sale of basic refractory bricks and shapes are high and are increasing.

C. *Basic Refractory Specialties*

31. Trade and commerce in the sale of basic refractory specialties in the United States is substantial, with 1973 sales amounting to $70.1 million.

32. In 1973, prior to the acquisition, concentration in the manufacture and sale of basic refractory specialties was high with the top four firms accounting for 80% of sales and the top eight accounting for 92%.

33. By virtue of the acquisition of Lavino, Kaiser controlled facili-

ties which accounted for 27.5% of the 1973 sales of basic refractory specialties and strengthened its position as the largest manufacturer of basic refractory specialties in that year.

34. On a *pro forma* basis the acquisition of Lavino by Kaiser increased the 1973 four-firm concentration from 80% to 83% and eight-firm concentration from 92% to 94% in sales of basic refractory specialties.

35. There have been no new entrants into the manufacture and sale of basic refractory specialties since 1962.

36. Barriers to entry into the manufacture and sale of basic refractory specialties are high and are increasing.

VI. EFFECTS OF THE ACQUISITION

37. The effects of the acquisition set forth in Paragraph 11 may be substantially to lessen competition or tend to create a monopoly in the relevant markets, in violation of Section 7 of the Clayton Act, *as amended,* and the acquisition constitutes an unfair method of competition and unfair act and practice within the meaning of Section 5 of the Federal Trade Commission Act, *as amended,* in the following ways among others:

(a) eliminating substantial competition between Kaiser and Lavino and among Kaiser, Lavino and other competitors in the relevant markets;

(b) significantly increasing the already high levels of concentration in the relevant markets;

(c) significantly raising the already high barriers to entry into the relevant markets;

(d) increasing and threatening to still further increase concentration in the relevant markets through additional mergers by other competitors; and

(e) strengthening the position of Kaiser in the relevant markets.

VII. VIOLATIONS CHARGED

38. The acquisition set forth in Paragraph 11 constitutes a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18).

39. The acquisition set forth in Paragraph 11 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

FINAL ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On September 25, 1984, this matter was withdrawn from adjudication for consideration by the Commission of a proposed consent agreement. The Commission accepted the proposed consent and placed it on the public record on May 8, 1985, for comment pursuant to Section 3.25(f) of the Commission's Rules of Practice and Procedures.

Having considered the views of the parties to the consent and the comment received from the public, the Commission has determined that the public interest would best be served by rejecting the consent agreement and dismissing the complaint. In this instance, the respondent has transferred control of all of its operating refractories facilities in the United States to other entities and has stated that it has no intention of engaging in the refractories business. Such being the case, the public interest no longer requires that respondent be subject to a Commission order. Therefore

It is ordered, That this matter be returned to adjudication and

It is further ordered, That the complaint issued in the matter be, and it hereby is, dismissed.

IN THE MATTER OF

MONTANA BOARD OF OPTOMETRISTS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3161. Complaint, Aug. 29, 1985—Decision, Aug. 29, 1985

This consent order requires the Montana Board of Optometrists (the Board), among other things, to cease adopting or maintaining any rule, regulation, policy or course of conduct that has the effect of prohibiting, restricting, or discouraging any qualified person from advertising price-related terms or claims of professional superiority; and declaring such advertising to be illegal, unethical, or unprofessional. The Board is barred from taking or threatening disciplinary action against any individual or organization that advertises price-related terms and claims of professional superiority; and from inducing or assisting others to take any of the prohibited actions. The Board is additionally required to distribute a copy of the order and an explanatory announcement to all optometrists licensed to practice in Montana; and provide such material to all those applying for a license for a period of five years.

Appearances

For the Commission: *Cynthia Wicker.*

For the respondent: *Geoffrey Brazier,* Montana State Department of Commerce, Helena, Mont.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, ("Commission"), having reason to believe that the Montana Board of Optometrists ("Board") has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENT

1. Respondent Montana Board of Optometrists is organized, exists and transacts business under the laws of the State of Montana, with its principal office and place of business located at The Department of Commerce, 1424 9th Avenue, Helena, Montana. Mont. Code Ann. Titles 2 and 37. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

2. The Board is composed of four members: three optometrists and a public member. Board members are appointed to four year terms by the Governor of the State of Montana, with the consent of the state senate. Mont. Code Ann. § 2–15–1846.

3. When making appointments to the Board, the governor may consider the recommendations of private associations. Mont. Code Ann. § 37–1–132.

4. The governor often appoints to the Board optometrists who are members of the Montana Optometric Association. All of the current Board members who are optometrists are members of the Montana Optometric Association.

5. The Board is the sole licensing authority for optometrists. It is unlawful to practice optometry in Montana unless licensed by the Board. Mont. Code Ann. § 37–10–301(1)(a).

6. The Board is responsible for establishing standards and rules governing the licensing, certification, registration, and conduct of optometrists in the state, so long as such standards and rules are consistent with state law. Mont. Code Ann. §§ 37–1–131(1) and 37–10–202(1). The Board is further authorized to discipline persons who violate its rules or the state laws relating to the practice of optometry. These disciplinary actions include, but are not limited to, revocation, suspension, limitation, or restriction of a license to practice optometry in Montana. Mont. Code Ann. § 37–1–136.

7. While serving their membership terms, members of the Board who are optometrists must engage in the "exclusive practice" of optometry in Montana. Mont. Code Ann. § 2–15–1846. Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to $50.00 per day of actual service. Mont. Code Ann. § 37–1–133.

8. Except to the extent that competion has been restrained as alleged herein, optometrists compete with one another and Board members who are optometrists compete with other optometrists they regulate.

9. In the conduct of their business, optometrists in Montana advertise in media having interstate circulation, receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering optometric services, prescribe or administer medicines that are shipped in interstate commerce, and use supplies and equipment that are shipped across state lines. The acts and practices described below are in interstate commerce, or affect these and other interstate activities, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act. 15 U.S.C. 45(a)(1).

STATE POLICY FAVORING TRUTHFUL, NONDECEPTIVE ADVERTISING BY OPTOMETRISTS

10. Since at least 1981 the State of Montana has had a clearly articulated policy protecting the dissemination of truthful, nondeceptive, information about optometric goods and services.

11. The Montana State Law relating to advertising by optometrists is contained in Title 37, Chapter 10 of the Montana State Code. Prior to 1981 Montana banned the advertising of optometric goods and services "at a price or stated terms of a price or as being free." Mont. Code Ann. § 37–10–301(1)(k). In 1980 the Office of the Legislative Auditor, acting under the dictates of the Montana Sunset Law of 1977, reviewed the Montana Board of Optometrists. At the conclusion of that review, the Legislative Auditor reported to the Legislative Audit Committee of the Montana State Legislature that the above statute appeared to be unconstitutional.

12. The Montana Legislative Audit Committee subsequently recommended the introduction of a bill repealing Section 37–10–301(1)(k). That bill passed, and became effective April 29, 1981.

13. The statute states that "(t)his chapter does not prohibit legitimate or truthful advertising by a registered optometrist." Mont. Code Ann. § 37–10–311(i). Title 37, Chapter 10's restrictions on optometric advertising are now limited to "advertis[ements] in which ambiguous or misleading statements are made," and "the use in advertising of the expression 'eye specialist' or 'specialist in eyes' in connection with the name of an optometrist." Mont. Code Ann. § 37–10–311(h) & (i).

14. State law limits the Board's rulemaking authority to rules "not inconsistent with the provisions of [Chapter 10]." Mont. Code Ann. § 37–10–202.

BOARD CONDUCT

15. In direct violation of the state policy protecting truthful advertising the Board has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to unreasonably restrain trade by preventing the dissemination of truthful, nondeceptive, information about ophthalmic goods and services. In furtherance of this combination or conspiracy the Board has adopted:

A. Rule 8.36.407(2), which declares that it constitutes unprofessional conduct to advertise:

1. Free eye examinations;

2. Any stipulated amount of money as down payment, or that no down payment is required;

3. Any stipulated amount of money as a periodic payment; and

4. The terms "credit," or "installment," or any "similar word."

B. Rule 8.36.406(f), which bans an optometrist from making claims of professional superiority or of having equipment others cannot obtain.

16. The Board has furthered this combination or conspiracy by using these rules, and other means, to coerce individuals to abandon their efforts to disseminate truthful information about the nature and quality of ophthalmic goods and services.

17. In addition, the Board issued at least two cease and desist orders, in which it cited a Board rule forbidding optometric advertisements containing the terms "Contact Lens Clinic" and "Vision Center" after that rule had been repealed.

18. By these and other means the Board has continued its course of conduct, despite the fact that in 1979 the Montana Attorney General advised it that the above described regulations violate state and federal antitrust laws, and recommended that the Board repeal the regulations.

CONSUMER AND COMPETITIVE INJURY

19. The acts and practices described above have restrained and continue to restrain competition unreasonably and injure consumers in the following ways, among others:

A. Consumers and potential consumers of ophthalmic goods and services are deprived of the benefits of vigorous competition;

B. Consumers and potential consumers are deprived of truthful information about free eye examinations or consultations;

C. Consumers and potential consumers are deprived of truthful information about credit and payment terms for ophthalmic goods and services;

D. Consumers and potential consumers are deprived of truthful information about differences in skills, training and experience among optometrists, and the services they provide;

E. Optometrists are prevented from disseminating truthful information about their fees, credit and payment terms;

F. Optometrists are prevented from disseminating truthful information about their skills, training and experience, and the services they provide; and

G. Optometrists in general are unreasonably restrained from competing in the market for optometric goods and services, and new optometrists in particular are confronted by artificial barriers to entry into the market.

20. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section

5 of the Federal Trade Commission Act. The acts and practices are continuing and will continue absent the entry of an order for appropriate relief.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its counsel and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. The respondent is organized, exists and transacts business under the laws of the State of Montana, with its principal office and place of business located at Department of Commerce, 1424 9th Avenue, Helena, Montana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For the purposes of this order, the following definitions shall apply:

A. *Board* shall mean the Montana Board of Optometrists, its successors and assigns.

B. *Disciplinary action* shall mean:

1. The refusal to grant, or the restriction, revocation or suspension of, a license to practice optometry in Montana; the refusal to admit a person to examination for a license to practice optometry; the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; or the imposition of a fine, probation, or other penalty or condition; or

2. The initiation of an administrative, criminal, or civil court proceeding against any person or organization.

C. *Price-related terms* are terms that refer to:

1. Free eye examinations;

2. Down payments, or any stipulated amount of money as a down payment, or any indication that no down payment is required;

3. Periodic payments, or any stipulated amount of money as periodic payments;

4. Credit, installment, or any other term relating to deferred payments.

D. *Professional superiority* shall mean any truthful claim of specialization, skill, equipment, treatment, training, experience or service offered, or any other information that would tend to distinguish an advertiser's practice from other ophthalmic practices.

I.

It is ordered, That the Montana Board of Optometrists, its officers, agents, committees, representatives, employees, successors, and assigns, directly or indirectly, through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, impeding, or discouraging any person from advertising or publishing the prices, terms or conditions of sale for any ophthalmic service or product offered for sale or made available by any person or organization that may lawfully offer the service or product. Such actions include, but are not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that has the purpose or effect of prohibiting, restricting, or discouraging any person from advertising price-related terms or claims of professional superiority;

2. taking or threatening to take any disciplinary action against any person or organization for advertising price-related terms or claims of professional superiority;

3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper practice for any person or organization to advertise price-related terms or claims of professional superiority; and

B. Inducing, urging, encouraging or assisting any optometrist or any optometric association, group of optometrists, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

Provided, That, nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action to prohibit: (1) advertising that uses the expression "eye specialist" or "specialist on eyes" in connection with the name of an optometrist; or (2) advertising in a manner that the Board reasonably believes is ambiguous or misleading within the meaning of Mont. Code Ann. § 37–10–311(2)(h) & (i).

Provided further, That, this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of optometry.

II.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A and a copy of this order:

1. to each person presently licensed to practice optometry in Montana, and to each person who has on the date of service of this order a pending application for such a license, within thirty (30) days after the date of service of this order; and

2. for a period of five (5) years after the date of service of this order, to each person who hereafter applies for a license to practice optometry in Montana, within thirty (30) days after such person applies for the license;

B. For a period of five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, copies of all records relating to advertising, including but not limited to, written communications, and any summaries of oral communications to or from the Board regarding the offering, publishing or advertising of information about ophthalmic services;

C. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of optometry in Montana that may affect compliance obligations arising out of this order,

such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board;

D. Within sixty (60) days after the date of service of this order, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which the Board has complied with this order.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Montana Board of Optometrists has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit optometrists from truthfully advertising their services. The Board may not (1) adopt or maintain rules, regulations, or policies that prohibit truthful advertising of price-related terms and claims of professional superiority with respect to the sale of optometric services, (2) take disciplinary action (such as the suspension or revocation of a certificate of license) or threaten disciplinary action against any person or organization so advertising or (3) declare it to be illegal or unethical for persons to so advertise. The Board is also prohibited from encouraging any optometrist or any professional group or association to take actions that the order prohibits the Board from taking. The order does not affect the Board's authority to prohibit and discipline licensees for advertising that is ambiguous or misleading.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed. Further information may be obtained from the FTC by calling Jack L. Young at (202) 523–3596.

[Title]
Montana Board of Optometrists

IN THE MATTER OF

ORANGE COUNTY BOARD OF REALTORS, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3162. Complaint, Sept. 9, 1985—Decision, Sept. 9, 1985

This consent order requires, among other things, that an Orange County, N.Y. Board of Realtors and its wholly-owned subsidiary, which provide a multiple listing service for its member real estate brokers, cease restricting or interfering with any broker's offering or acceptance of an exclusive agency listing or with the publishing of such listing on the multiple listing service. The companies are further required to publish exclusive agency listings in a non-discriminatory manner, and to timely amend their by-laws, rules and regulations, and other materials to conform to the provisions of the order.

Appearances

For the Commission: *L. Barry Costilo, Jacques Feuillan* and *Alan J. Friedman.*

For the respondents: *James R. Loeb, Rider, Drake, Summers & Loeb,* Newburgh, New York.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents Orange County Board of Realtors, Inc., and Multiple Listing Service of the Orange County Board of Realtors, Inc., have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

1. As used in this complaint:

a. *Member* or *member firm* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondents.

b. *Listing* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

c. *Exclusive right to sell listing* shall mean any listing under which

the property owner appoints the broker as his or her exclusive agent for the sale of the property and agrees to pay the broker an agreed commission if the property is sold, whether by the broker or any other person including the owner.

d. *Exclusive agency listing* shall mean any listing under which the property owner appoints a broker as his or her exclusive agent at an agreed commission, but reserves the right to sell the property personally with no commission owed or at an agreed reduction in commission.

2. Respondents Orange County Board of Realtors, Inc., and Multiple Listing Service of the Orange County Board of Realtors, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of New York. Respondents' principal offices and places of business are at 50 North Church Street, Goshen, New York, in Orange County. The population of Orange County is approximately 260,000.

3. Each respondent is now and has been at all times relevant herein a corporation organized in substantial part for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent Orange County Board of Realtors controls the acts and practices of its wholly-owned subsidiary, respondent Multiple Listing Service of the Orange County Board of Realtors. Only members of the Orange County Board of Realtors may be members of the Multiple Listing Service of the Orange County Board of Realtors. Respondents coordinate and act together in carrying out the business of the Multiple Listing Service of the Orange County Board of Realtors.

5. Respondents are now and have been since at least 1974 providing a multiple listing service ("MLS") for member real estate brokerage firms doing business in Orange County. The member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate, as well as other related services designed to facilitate such sales. Each member firm agrees to submit all of its Orange County exclusive right to sell residential property listings for publication on the multiple listing service to the entire MLS membership and to share brokerage commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the MLS.

6. Membership in respondents' multiple listing service provides valuable competitive advantages in the brokering of residential real estate in Orange County. It significantly increases the opportunities of brokerage firms to enter into listings with residential property

owners. It also significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales that is important for brokerage firms to compete effectively in the market.

7. Respondents' multiple listing service is the only real estate multiple listing service serving Orange County. The vast majority of the active, full-time residential real estate brokerage firms doing business in Orange County have been and are now members of the MLS. Approximately 105 firms are members of respondents' MLS, including the ten largest Orange County residential real estate brokerage firms in terms of dollar sales.

8. Publication of listings on respondents' multiple listing service is generally considered by sellers and their brokers to be the fastest and most effective and convenient means of obtaining the broadest market exposure for residential property in Orange County.

9. For each year since at least 1974, the vast majority of the total dollar volume of residential real estate sales in Orange County occurred through brokerage firms and involved listings published on respondents' MLS. Sales of real estate listings published on respondents' MLS totaled about $58 million for 1982 and $86.5 million for 1983. Almost the entire dollar sales volume of MLS-published listings represents sales of residential real estate in Orange County.

10. Except to the extent that competition has been restrained as described in Paragraph 12 below, respondents' members are now and have been in competition among themselves and with other firms in the provision of residential real estate brokerage services.

11. In adopting the policies and engaging in the acts and practices described in Paragraph 12 below, respondents have been and are now acting as a combination of their members, or in conspiracy with some of their members, to restrain trade in the provision of residential real estate brokerage services.

12. Through MLS regulations in effect since at least 1974, respondents have been refusing to publish any exclusive agency listing on their multiple listing service, restricting the multiple listing service to only exclusive right to sell listings. These regulations have effectively prevented property owners and brokers from arranging a brokerage contract that allows the owner to pay less or no commission if the owner locates the buyer independently of any broker.

13. The purposes or effects, and the tendency and capacity, of the policies, acts, and practices of respondents as described in Paragraph 12 above have been and are to unreasonably restrain competition in one or more of the following ways, among others:

a. restrain price competition among brokerage firms;

b. restrain competition among brokerage firms based on willingness

to accept different contract terms that may be attractive and beneficial to consumers;

c. substantially limit the ability of consumers to negotiate lower prices for brokerage services and brokerage contract terms that may be more advantageous than an exclusive right to sell listing;

d. substantially limit the ability of residential property sellers to compete with real estate brokers in locating purchasers; and

e. substantially limit consumers' ability to choose among a variety of brokerage firms competing on the basis of price, contract terms, and services.

14. In the conduct of their businesses and through the policies, acts, and practices described in Paragraph 12 above, respondents and their members involve or affect:

a. a substantial interstate flow of funds used in the financing of Orange County real estate;

b. a substantial amount of Orange County real estate financing guaranteed or insured under federal government programs;

c. the sale of a substantial amount of title and homeowners' insurance by interstate insurers to Orange County property owners;

d. the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of respondents' MLS; and

e. the interstate or international sale of computer services to respondents' MLS.

As a result of these and other events and effects, the policies, acts, and practices of respondents and their members as described in Paragraph 12 above are in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

15. The policies, acts, practices, and combinations or conspiracies described in Paragraph 12 above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Each respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents' offices and principal places of business are located at 50 North Church Street, in the City of Goshen, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of each respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this order, the following definitions shall apply:

1. *Member* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondents Orange County Board of Realtors, Inc., and Multiple Listing Service of the Orange County Board of Realtors, Inc.

2. *Listing* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

3. *Exclusive right to sell listing* shall mean any listing under which the property owner appoints the broker as his or her exclusive agent for the sale of the property and agrees to pay the broker an agreed commission if the property is sold, whether by the broker or any other person including the owner.

4. *Exclusive agency listing* shall mean any listing under which the

property owner appoints a broker as his or her exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally with no commission owed or at an agreed reduction in the commission.

I.

It is ordered, That each respondent and its directors, officers, committees, representatives, agents, employees, subsidiaries, successors, and assigns, directly or indirectly or through any device, in or in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Restricting or interfering with:

1. any broker's offering or acceptance of any exclusive agency listing; or
2. the publishing on respondents' multiple listing service of any exclusive agency listing of a member.

B. Publishing on respondents' multiple listing service any exclusive agency listing:

1. in any manner different from the publishing of any exclusive right to sell listing; or
2. in any category separate from exclusive right to sell listings;

provided, however, that nothing contained in subparts I.A. or I.B. shall prohibit respondents from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; and (b) applying reasonable terms and conditions equally applicable to, and not discriminatory in their impact upon, the publication of any listing, whether exclusive agency or exclusive right to sell.

II.

It is further ordered, That each respondent shall:

A. Within sixty (60) days after this order becomes final, amend its by-laws and rules and regulations and any other of its materials to conform to the provisions of this order.

B. For a period of five (5) years after this order becomes final, furnish promptly a copy of this order to any person who requests a copy.

C. For a period of ten (10) years after this order becomes final, make

available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, all documents that relate to determining whether either respondent has been and is complying with this order.

III.

It is further ordered, That respondents shall jointly:

A. Within thirty (30) days after this order becomes final, furnish a copy of this order to each member of the multiple listing service.

B. Within sixty (60) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which respondents have complied and are complying with this order.

C. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in either corporation that may affect compliance obligations arising out of this order.

IN THE MATTER OF

MULTIPLE LISTING SERVICE OF THE GREATER MICHIGAN CITY AREA, INC. also d/b/a MULTIPLE LISTING SERVICE OF LAPORTE COUNTY, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3163. Complaint, Sept. 11, 1985—Decision, Sept. 11, 1985

This consent order requires an Indiana firm providing a multiple listing service to member real estate brokers doing business in LaPorte County, Ind., among other things, to cease fixing, establishing or maintaining commission rates for brokerage services; urging its members to charge the customary market rate of commission; taking adverse action against non-conforming brokers; or otherwise engage in conduct having the tendency to restrain competition in the real estate brokerage market. The company is also barred from interfering with any statement disseminated in an advertisement that truthfully refers or relates to another broker's business practices; restricting a broker from offering or accepting an exclusive agency listing, reserve clause listing or open listing; and restraining a broker's participation or involvement in a competitive organization or service. The firm is further required to publish exclusive agency listings or reserve clause listings in its multiple listing service; timely amend their by-laws, rules and regulations, and other materials to conform to the provisions of the order; and provide area real estate brokers with a prescribed statement setting forth those terms. Additionally, the order prohibits the firm from improperly denying a membership application; requires a written notice of denial together with the reasons for the denial to be provided to rejected applicants; and requires the firm to maintain records relating to membership applications for a specified period.

Appearances

For the Commission: *Alan J. Friedman* and *Oscar M. Voss.*

For the respondents: *Thomas D. Sallwasser, Sallwasser & McClain,* Laporte, Ind.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., a corporation, also trading and doing business as Multiple Listing Service Of LaPorte County, Inc., has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

1. As used in this complaint:

a. *Multiple listing service* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with members who locate purchasers.

b. *Member* or *member firm* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondent Multiple Listing Service Of The Greater Michigan City Area, Inc.

c. *Applicant* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed by the Indiana Real Estate Commission as a real estate broker within the State of Indiana and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

d. *Listing* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

e. *Exclusive right to sell listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold, regardless of who locates the purchaser.

f. *Reserve clause listing* shall mean any exclusive right to sell listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a commission to the broker.

g. *Exclusive agency listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold through any real estate broker, but, if the owner locates the purchaser independently of any real estate broker, the owner owes a reduced commission or no commission to the broker.

h. *Open listing* shall mean any listing under which the property owner grants the broker a nonexclusive agency to locate a purchaser for the property, such that the owner is free to enter into other open listings with other real estate brokers and owes a commission only to the broker who locates the purchaser.

2. Respondent Multiple Listing Service Of The Greater Michigan City Area, Inc. ("MLS") is a corporation organized, existing and doing business under any by virtue of the laws of the State of Indiana. Respondent MLS's principal office and place of business is at 5450 North Johnson Road, Michigan City, Indiana, in LaPorte County. The population of LaPorte County is approximately 105,000, and the popu-

lation of Michigan City (the County's largest city) is approximately 40,000.

3. Respondent MLS is now and has been at all times relevant herein a corporation organized for its own profit and that of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent MLS is now and has been since 1970 providing a multiple listing service for member real estate brokerage firms doing business in LaPorte County. The member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate, as well as other related services designed to facilitate such sales. Each member firm agrees to submit all of its LaPorte County residential property listings (except for new residences in which the member has an ownership interest) for publication on the multiple listing service to the entire MLS membership and to share brokerage commissions with those member firms that successfully locate purchasers for properties it has listed. The MLS charges a fee to members for publishing listings on its multiple listing service only if the property is sold before the listing's expiration date; the fee is based on a percentage of the earned brokerage commission on the sale of the property. The MLS allows only exclusive right to sell listings to be published on its multiple listing service.

5. Membership in respondent MLS provides valuable competitive advantages in the brokering of residential real estate in LaPorte County. MLS membership significantly increases the opportunities of brokerage firms to enter into listings with residential property owners, as owners generally consider MLS publication of listings to be the fastest and most effective and convenient means of obtaining the broadest market exposure for residential property in LaPorte County. MLS membership also significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales that is important for brokerage firms to compete effectively in the market. Respondent MLS provides the only real estate multiple listing service serving LaPorte County. About 65 percent of the active, full time residential real estate brokerage firms doing business in LaPorte County have been and are now members of the MLS. Only two of the eight largest residential real estate brokerage firms in terms of dollar sales are not currently members of the MLS. For 1982, about 65 percent of the total dollar volume of residential real estate sales in LaPorte County through brokerage firms involved listings published on the MLS's multiple listing service by current MLS members. Also for 1982, approximately 80 percent of the total dollar volume of residential real estate sales in Michigan City through brokerage firms

involved listings published on the MLS's multiple listing service by current MLS members.

6. Sales of real estate listings published on the MLS's multiple listing service totaled about $30 million for 1981, at least $22 million for 1982, and about $31 million for 1983. Almost the entire dollar sales volume of MLS-published listings represents sales of residential real estate in LaPorte County.

7. Approximately thirty firms are members of the MLS's multiple listing service. Each member owns one share of MLS stock, entitling each firm to one vote in the operation of the multiple listing service. Only members may own MLS stock and participate in the MLS's multiple listing service.

8. The MLS requires each member to pledge adherence to MLS regulations and other MLS policies. Members found to be in violation of any MLS regulation or other MLS policy are subject to fine or to suspension or termination of membership.

9. Real estate brokers doing business in the State of Indiana must be licensed by the Indiana Real Estate Commission pursuant to state law. The state law licensing requirements include:

a. completion of prescribed courses of study;

b. one year experience as a licensed salesperson for a licensed real estate broker or equivalent experience; and

c. passing a written examination.

10. Except to the extent that competition has been restrained as described in Paragraphs 12 through 22 below, the MLS members are now and have been in competition among themselves and with other firms in the provision of residential real estate brokerage services.

11. In adopting the policies and engaging in the acts and practices described in Paragraphs 12 through 22 below, the MLS has been and is now acting as a combination of its members, or in conspiracy with some of its members or others, to restrain trade in the provision of residential real estate brokerage services.

12. Upon the formation of the MLS in 1970, the MLS adopted regulations requiring that members charge for brokerage services "only such fees as are . . . in accordance with local practice in similar transactions" and that "any listing filed with [the MLS] shall provide for payment of a commission in accordance with the customary practices within [LaPorte County]." These regulations are still in effect. Almost all of the LaPorte County brokerage firms, including almost all of the current MLS members, have been and are now customarily charging commission rates of six or seven percent of the gross sales price of residential property.

13. At some point in the early 1970's, at one or more MLS meetings

and elsewhere, most or all of the brokerage firms serving Michigan City, including most or all of the member firms of the MLS at that time, jointly determined to raise the customary commission rate for brokering residential property in Michigan City from six percent to seven percent of the gross sales price of the property. Within about six months after this joint determination was made, the predominant commission rate on the sale of residential property in Michigan City increased from six to seven percent, and seven percent continues to be the predominant rate charged by Michigan City brokerage firms.

14. The MLS, in conspiracy with some MLS members, has obstructed truthful comparative advertising, including truthful advertising of low commission rates. An MLS code of ethics requirement in effect since the MLS's formation in 1970 states that a member "shall never publicly criticize a competitor . . . ." During July to September 1978 or thereabouts, an MLS member became the first LaPorte County brokerage firm since at least 1970 to advertise a commission rate below six percent and to refer in advertising to its costs and services in comparison with other area firms. Despite the truthfulness of this advertising, the president of the MLS and other MLS members charged that this firm's advertising constituted improper public criticism of a competitor and, through the MLS, jointly coerced the advertising member to stop this conduct. Since this incident, no MLS member has attempted to advertise in a similar fashion.

15. Since at least 1978, and in order to deter the entry of new competitors and to impede price competition, respondent MLS has been and is now requiring any duly licensed real estate broker seeking MLS membership on behalf of his or her firm to have owned and operated a real estate brokerage business in LaPorte County for one year immediately preceding the date of application. In addition, the MLS has been requiring that the applicant, for this one year period (and that each member to retain membership):

a. derive the major or principal portion of earned income from full time practice of real estate brokerage; and

b. operate from an established place of business in LaPorte County at a nonresidential location.

In one instance, in 1980, the MLS denied membership to a brokerage firm that had been regularly charging a four percent commission rate. Even though this firm had operated in LaPorte County under the same ownership since at least 1975, it was denied membership on the ground that it did not have a business office located in a nonresidential location in LaPorte County for the requisite one year period.

16. In addition, the MLS has required some brokerage firms that

met the one year waiting periods described in Paragraph 15 above to wait for membership substantial additional periods of time. In 1980, the MLS notified one applicant that met the MLS's one year waiting period to reapply in about three months as no applications would be considered until that time. In 1978, before the above-described one year waiting periods were required, the MLS refused to process a membership application of a brokerage firm that had been operating full time in LaPorte County from a non-residential location for a number of years. About three or four months after receipt of this application, and only upon inquiry by the applicant, the MLS told the applicant that no new members were being accepted at that time and that no information could be provided on when new membership would be available.

17. Through the policies, acts, or practices described in Paragraphs 15 and 16 above, and since 1978, the MLS has unreasonably prevented or delayed the membership of at least eight firms by denying membership, failing to act upon applications, or deterring the submission of applications. At least six of these firms were new entrants and at least three of the eight, as of their dates of application or during their first year of operation, had regularly or frequently charged commission rates below six percent.

18. The MLS has been and is now prohibiting any member from entering into any exclusive agency listing, and the MLS has been and is now refusing to publish any exclusive agency listing on its multiple listing service.

19. The MLS has been and is now prohibiting any member from entering into any reserve clause listing with an individual residential property owner, and the MLS has been and is now refusing to publish any such listing on its multiple listing service.

20. The MLS has been and is now prohibiting any member from entering into any open listing with a residential property owner.

21. Respondent MLS has been and is now prohibiting any member from participating, without the approval of the MLS, in any organization that competes with the MLS's multiple listing service.

22. The MLS has been and is now unreasonably restricting the ability of members and property owners to cancel residential listings before the listing's expiration date. The MLS, through a regulation in effect since the MLS's formation in 1970, prohibits any member from entering into any agreement with a property owner to cancel a residential listing before the listing's expiration date without prior approval of the MLS. Although the MLS has approved a number of cancellations that release the member from further obligation to provide brokerage services under the listing (such as when the owner is taking the property off of the market), the MLS has been and is now

prohibiting any cancellation that would partially or fully release the owner from further obligation to pay a commission should the property be sold before the listing's original expiration date. The MLS also has been and is now prohibiting any cancellation that would provide for the transfer of the listing from a member to one of the member's former associates who has recently started his or her own firm.

23. The purposes or effects, and the tendency and capacity, of the policies, acts, or practices of the MLS and its members as described in Paragraphs 12 through 22 above have been and are to unreasonably restrain competition in one or more of the following ways, among others:

a. stabilize, fix, maintain, or interfere with prices of real estate brokerage services;

b. restrain price competition among brokerage firms;

c. unreasonably restrain the entry of new brokerage firms and of new joint ventures or shared brokerage or multiple listing services in competition with the MLS's multiple listing service;

d. restrain competition among brokerage firms based on willingness to accept different contract terms that may be attractive and beneficial to consumers, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property through alternative means;

e. substantially limit the ability of consumers to negotiate lower prices for brokerage services and brokerage contract terms that may be more advantageous than an exclusive right to sell listing;

f. substantially limit the ability of residential property sellers to compete with real estate brokers in locating purchasers;

g. substantially limit consumers' ability to choose among a variety of brokerage firms competing on the basis of price, contract terms, and services; and

h. deprive consumers of information pertinent to selecting a brokerage firm, and of the benefits of competition.

24. In the conduct of their businesses and through the policies, acts, and practices described in Paragraphs 12 through 22 above, the MLS and its members involve or affect:

a. a substantial interstate flow of funds used in the financing of LaPorte County real estate;

b. a substantial amount of LaPorte County real estate financing guaranteed or insured under federal government programs;

c. the sale of a substantial amount of title and homeowners' insurance by interstate insurers to LaPorte County property owners;

d. the franchise operations of those interstate chains of real estate

brokerage firms that include one or more members of respondent MLS; and

e. the interstate sale of computer services to respondent MLS.

As a result of these and other events and effects, the policies, acts, and practices of the MLS and its members as described in Paragraphs 12 through 22 above are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

25. The policies, acts, practices, and combinations or conspiracies described in Paragraphs 12 through 22 above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34(b) of its Rules and the recommendations of its staff; and

The respondent having been furnished with a copy of a revised draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration, and the respondent, its attorney, and counsel for the Commission having thereafter executed a revised agreement containing consent order dated August 28, 1984; and

The Commission having thereafter reconsidered the matter and having determined that it had reason to believe that the respondent has violated the said Act as stated in the revised complaint, and that such revised complaint should issue stating its charges in that re-

spect, and having thereupon withdrawn its acceptance of the original agreement and accepted the revised agreement and placed such revised agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34(b) of its Rules and the recommendations of its staff; and

The revised agreement containing the following consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid revised draft of complaint, a statement that the signing of said revised agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such revised complaint, and waivers and other provisions as required by the Commission's Rules;

Now in conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 5450 North Johnson Road, in the City of Michigan City, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Definitions

For the purposes of this order, the following definitions shall apply:

1. *Multiple listing service* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with members who locate purchasers.

2. *Member* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondent Multiple Listing Service Of The Greater Michigan City Area, Inc.

3. *Applicant* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed by the Indiana Real Estate Commission as a real estate broker within the State of Indiana and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

4. *Market* shall mean the provision of real estate brokerage services for residential properties located in LaPorte County, Indiana.

5. *Listing* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

6. *Exclusive right to sell listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold, regardless of who locates the purchaser.

7. *Reserve clause listing* shall mean any exclusive right to sell listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a commission to the broker.

8. *Exclusive agency listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold through any real estate broker, but, if the owner locates the purchaser independently of any real estate broker, the owner owes a reduced commission or no commission to the broker.

9. *Open listing* shall mean any listing under which the property owner grants the broker a nonexclusive agency to locate a purchaser for the property, such that the owner is free to enter into other open listings with other real estate brokers and owes a commission only to the broker who locates the purchaser.

I.

It is ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., and its directors, officers, committees, representatives, agents, employees, subsidiaries, successors, and assigns, directly or indirectly or through any device, in or in connection with respondent's operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Fixing, establishing, or maintaining any rate, range or amount of commission for real estate brokerage services, or otherwise restraining price competition among real estate brokers, including but not limited to:

1. requiring, urging, recommending, or suggesting that any broker charge for brokerage services only such commissions or commission rates as are in accordance with local practice in similar transactions;

2. requiring, urging, recommending, or suggesting that any listing filed with respondent's multiple listing service provide for payment of a commission in accordance with the customary practices within the market;

3. requiring, urging, recommending, or suggesting that any broker refrain from charging or advertising any commission or commission

rate below what is customarily charged or prevailing in the market; or

4. taking or threatening any action that has the purpose or effect of penalizing, discriminating against, or interfering with any broker's charging or advertising any commission or commission rate below what is customarily charged or prevailing in the market.

B. Declaring to be unethical or otherwise restricting or interfering with any statement in a generally disseminated advertisement by a broker that truthfully refers or relates to the business practice of any other real estate broker, such as truthful comparisons of commissions, commission rates, operating costs, services, methods of operation, or brokerage terms or conditions. Generally disseminated advertisements shall include any advertisement through the media, through printed distributions covering a particular geographic area or a particular association of persons, or through other general means.

C. Adopting any policy or taking any other action that has the purpose or effect of:

1. requiring that any applicant or prospective applicant must have been engaged to any degree or in any manner or capacity in real estate brokerage for any period of time before becoming eligible for membership in respondent's multiple listing service;

2. requiring that any prospective applicant, applicant, or member must:

a. engage in real estate brokerage full time;

b. derive any particular amount or portion of income from real estate brokerage; or

c. operate from an established place of business at a nonresidential location;

3. restricting the acceptance of any membership application for processing to unreasonably infrequent or limited periods of time during the year;

4. unreasonably delaying action on any membership application or the induction of any new member; or

5. discriminating against any prospective applicant, applicant, or member that is a new entrant in the market or new to respondent's multiple listing service;

provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

D. Restricting or interfering with:

1. any broker's offering or acceptance of any exclusive agency listing or reserve clause listing; or

2. the publishing on respondent's multiple listing service of any exclusive agency listing or reserve clause listing of a member.

E. Publishing on respondent's multiple listing service any exclusive agency listing or reserve clause listing:

1. in any manner different from the publishing of any exclusive right to sell listing; or

2. in any category separate from exclusive right to sell listings;

provided, however, that nothing contained in subparts I.D. or I.E. shall prohibit respondent from: (a) including a simple designation that a published listing is an exclusive agency listing or reserve clause listing rather than an exclusive right to sell listing; (b) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; and (c) applying reasonable terms and conditions equally applicable to, and not discriminatory in their impact upon, the publication of any listing, whether exclusive agency, reserve clause, or exclusive right to sell.

F. Prohibiting any broker from entering into any open listing.

G. Restricting or interfering with any broker's development of, or participation or involvement in, any organization, service, or venture that competes in any way with respondent's multiple listing service.

H. Restricting or interfering with any member and property owner cancelling a listing before the listing's expiration date; provided, however, that nothing contained in this subpart shall prohibit respondent from: (1) requiring three days advance notice of the cancellation, including a copy of the cancellation agreement; (2) charging a reasonable and nondiscriminatory fee for any service it provides if the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs for any service it provides.

II.

It is further ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., shall:

A. Within sixty (60) days after this order becomes final, amend its by-laws, code of ethics, and rules and regulations and any other of its materials to conform to the provisions of this order.

B. Within thirty (30) days after this order becomes final, make its best efforts to distribute an announcement in the form shown in

Appendix A to the principal(s) of each real estate brokerage firm doing business in LaPorte County, Indiana (including each member and including any other brokerage firm listed in the most current telephone yellow page directories for Michigan City and the city of LaPorte), including a sufficient number of copies to permit each real estate broker and salesperson associated with any such firm to receive the announcement.

C. For a period of five (5) years after this order becomes final, furnish promptly a copy of this order to:

1. any person who inquires in writing about, or who submits an application for, membership in respondent's multiple listing service; and

2. any other person who requests a copy.

III.

It is further ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., shall:

A. Within sixty (60) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

B. For a period of ten (10) years after this order becomes final:

1. provide to any applicant who has been denied membership prompt and clear written notice of the denial, specifying the membership requirements not met and explaining in what manner the requirements are not met; and

2. keep all documents that discuss, refer, or relate to any denied or approved application for a period of five (5) years from the final decision on such application, maintaining all such documents in one separate file segregated by the names of the applicants.

C. For a period of ten (10) years after this order becomes final, make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, all documents that relate to determining whether respondent has been and is complying with this order, including but not limited to the documents required to be kept by subpart III. B. of this order.

D. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change

in the corporation which may affect compliance obligations arising out of this order.

E. Require as a condition of sale or transfer of all, or a substantial part, of respondent's business or assets to any other person seeking to perform essentially the same services as respondent in LaPorte County, Indiana that such successor or transferee file promptly with the Federal Trade Commission a written agreement to be bound by the terms of this order; *provided, however,* that if respondent wishes to present to the Commission any reasons why this order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth such reasons prior to the consummation of the succession or transfer.

IV.

It is further ordered, That nothing in this order shall be construed to exempt respondent from compliance with the antitrust laws or the Federal Trade Commission Act, and the fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws and statute.

APPENDIX A

[Date]

[Respondent's Regular Letterhead]

ANNOUNCEMENT

As you may be aware, the Multiple Listing Service Of The Greater Michigan City Area, Inc., has entered into a consent agreement with the Federal Trade Commission that has now become final. The following is a brief summary of the provisions of the order issued pursuant to the consent agreement:

1. *Commission rates and advertising:* The MLS will not maintain any rate or amount of commission or fee for real estate brokerage services or restrain competition among member firms in any manner. Any member will be free to charge any commission rate and to engage in general truthful advertising of any type, including comparative advertising of rates or of other terms and services.

2. *Eligibility for membership:* The MLS will not require as a prerequisite for membership that a broker have owned and operated a business for a one year period or any other time period. In addition, the MLS will not require any applicant or member to be engaged full time in real estate brokerage, to operate from an office outside of the home, or to avoid participating in any other organization that competes with the MLS. Applications will be accepted and acted upon without unreasonable delay. If any membership application is denied, the MLS will promptly provide to the applicant a written explanation of the specific reasons for the denial.

3. *Property listings that limit or differ from an exclusive right to sell arrangement:*

Members will be free to enter into any exclusive agency listing* or reserve clause listing.** The MLS will publish all listings of these types with notice that the listing is an exclusive agency listing or reserve clause listing rather than a standard exclusive right to sell listing.*** Members also will be free to enter into any open listing. Under the order, the MLS will be free to allow or to disallow publication of open listings.

4. *Cancellation of listings:* The MLS will not prohibit the cancellation of a listing before its expiration date. However, the MLS may require three days advance notice of the cancellation. In addition, the MLS may still charge the member a regular service fee if the property subject to a cancelled listing is sold before the original expiration date of the listing, so long as that fee is not otherwise owed to the MLS by another member. In lieu of levying any such charge, the MLS may simply charge each member cancelling a listing a fee to cover the cost of publishing that listing.

The FTC is not endorsing any practice of the MLS that has not been challenged. For more specific information, you should refer to the FTC order itself. A copy of the order will be furnished to any person upon request.

President
Multiple Listing Service Of The
Greater Michigan City Area, Inc.

* Under an exclusive agency listing, the owner owes a reduced commission or no commission to the broker if the owner locates the purchaser independently of any real estate broker.

** According to the order, a reserve clause listing is any exclusive right to sell listing that includes a provision reserving the owner's right to sell to designated persons without owing a commission to the broker.

*** The MLS may charge the listing member a fee to cover the cost of publishing the listing upon a sale where no brokerage commission is due.

IN THE MATTER OF

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3164. Complaint, Sept. 18, 1985—Decision, Sept. 18, 1985

This consent order requires a national association whose members provide services to clients in connection with the importation of merchandise into the United States, among other things, to cease adopting, maintaining, or enforcing any by-law, code of ethics, provision, rule or regulation that restricts or attempts to restrict the ability of a member to offer price discounts or reach independent pricing decisions relating to custom brokerage services. The Association is also barred from commencing or continuing any affiliation or formal relationship with an organization that engages in the prohibited conduct. Further, the order requires that the Association timely send a copy of the complaint and order, to each of its current members, together with the attached explanatory letter; publish the order in its "Bulletin" or newsletter; and provide a copy of the order to all new members and affiliates for a period of three years.

Appearances

For the Commission: *Dennis McFeeley* and *Barbara Wright.*

For the respondents: *Gerald H. Ullman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Customs Brokers & Forwarders Association of America, Inc., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent the National Customs Brokers & Forwarders Association of America, Inc. (hereafter "Association"), is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its headquarters is at One World Trade Center, Suite 1109, New York, New York.

PAR. 2. The Association is a trade association with approximately 343 regular members located in most of the states of the United

States. The Association operates in substantial part for the economic benefit of its members and is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended.

PAR. 3. Members of the Association provide services to clients in connection with the importation of merchandise into the United States. These services include determining the correct duty to be paid to the United States Customs Service, filing of the appropriate papers with the Customs Service, and performing other services for which members charge fees to their clients.

Members of the Association compete with each other in the sale of customs brokerage services.

PAR. 4. Members of the Association are integrally involved in the process of importing merchandise into the United States. Merchandise imported through the facilities and services of Association members is sold throughout the United States. Therefore, the acts and practices of the Association and its members affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 5. Acting as a combination of, and in conspiracy with, its members, the Association has restrained price competition among its members. In furtherance of this combination and conspiracy, the Association adopted a by-law requiring that its members charge fees that would assure a fair return for services rendered.

PAR. 6. The purposes and effects of the combination or conspiracy alleged in Paragraph Five have been as follows:

a) The Association's members have been restricted in their ability to reach independent pricing decisions and to offer price discounts;

b) Customers who import goods and use the services of the Association's members have been restricted in their ability to receive discounts and to obtain the benefit of open price competition among the Association's members.

PAR. 7. The combination or conspiracy and the acts and practices described in Paragraph Five are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Customs Brokers and Forwarders Association of America, Inc., is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at One World Trade Center, Suite 1109, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. The term *Association* means the National Customs Brokers & Forwarders Association of America, Inc., its successors or assigns, and its officers, board members, directors, committees, members, agents, representatives or employees.

B. The term *customs broker* shall mean any entity licensed as a customs broker by the United States Customs Service.

II.

It is ordered, That the Association, directly or indirectly, or through any corporate or other device, shall cease and desist from:

A. Adopting, participating in, maintaining or enforcing any by-law, code of ethics provision, rule, regulation, agreement, understanding, plan or program, either directly or indirectly, that restricts or attempts to restrict any member's ability to offer price discounts, or otherwise restricts or attempts to restrict the ability of any member to reach independent decisions concerning prices for the sale of customs brokerage services.

B. Affiliating or establishing a formal relationship, as set forth in the by-laws of the Association, or continuing an affiliation or formal relationship with any organization that has customs brokers in its membership that violates Section II.A of this order.

III.

It is further ordered, That the Association shall:

A. Within thirty (30) days after the date of service of this order send to each of its members a copy of the complaint and decision and order in this matter, with the letter attached to this order.

B. Publish this order within 30 days after the date of service on respondent in 10-point boldface (or larger) type under the heading "Federal Trade Commission Order" in the Association's "Bulletin" or similar newsletter read by the Association's general membership.

C. Provide written notice of the name and address of any association of customs brokers that is disaffiliated or is refused affiliation pursuant to Section II.B of this order. The notice shall reference this matter by name of case and docket number and shall be sent to the Assistant Director for Compliance, Bureau of Competition, Federal Trade Commission and the Regional Director, Seattle Regional Office, Federal Trade Commission.

D. For three (3) years from the date of service of this order, provide to each new Association member or affiliate a copy of the complaint and decision and order in this matter. The complaint and decision and order shall be provided not later than thirty (30) days after the new member is accepted into membership or the organization is accepted as an affiliate.

IV.

It is further ordered, That the Association shall, within sixty (60) days after service of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, That the Association shall notify the Commission at least thirty (30) days prior to any proposed change in the Association, including, but not limited to, disbanding, dissolution, assignment, the formation of a successor or substitute entity, or any other change in the Association that may affect compliance obligations arising out of this order.

ATTACHMENT

[Association letterhead]

Dear Member:

This letter is to notify you that, without admitting liability for any wrongdoing, we have voluntarily entered into an agreement with the Federal Trade Commission that resulted in the entry of a consent order on [enter date of order]. The order requires that this association not engage in certain practices. Copies of the complaint and order are included.

In accordance with the terms of the order, you are hereby notified that, among other requirements of the order, the National Customs Brokers & Forwarders Association of America, Inc. may not adopt or maintain any provision in its bylaws, codes of ethics or elsewhere, or enter into any agreement or understanding, that discourages the discounting of prices or that has the purpose or effect of stabilizing or fixing prices or other terms or conditions for the sale of customs brokerage services.

Moreover, violations of the order by affiliate associations of the National Customs Brokers & Forwarders Association of America, Inc. will result in the Association's disaffiliation of those local associations.

As you may be aware, the code of ethics provisions in the by-laws of this association recently have been altered. The change deletes the requirement in the code of ethics that fees charged by members shall assure a fair return for the services rendered. All of the criteria to be considered in setting fees were also deleted from the code. You are not required to consider these code provisions in setting fees. Any fees you have set that are based in whole or in part upon the deleted code of ethics provisions should be re-determined by you independently of the former code of ethics provisions.

This letter summarizes the important parts of the order, but you should read it carefully in its entirety.

Sincerely,

John Hammon
Executive Vice President

IN THE MATTER OF

DR. BARRY BRICKLIN

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9194. Complaint, June 24, 1985—Decision, Sept. 20, 1985

This consent order requires Dr. Barry Bricklin, among other things, to cease representing that he used his expertise as a psychologist and expert in the psychological aspects of dieting to test and evaluate weight control programs and products in the same way similarly qualified experts normally would. Also, respondent is prohibited from representing that consumers can eat as much food as they want and still lose weight without also giving specified disclosures about weight reduction; and from making claims about "usual" or "average" weight loss, or the efficacy or performance of weight reduction or weight control products or programs without competent and reliable surveys or other scientific evidence that substantiates the representation. Further, respondent is required to maintain records of substantiation for three years; file compliance reports with the Commission at specified times; and notify the Commission of the discontinuance of his present employment and any future employment in similar areas.

Appearances

For the Commission: *Michael Dershowitz* and *Sandra N. Hammer.*

For the respondents: *Pro se.*

COMPLAINT*

The Federal Trade Commission, having reason to believe that Buckingham Productions, Inc., trading and doing business as Rotation Diet Center; Furlong-Elliot Corp.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; Rotation-Freedom Diet, Inc., corporations; Howard Elliot; Judy Ruthrauff; Dorothy Woolslager; and Benito Ventresca, individually and as officers of said corporations; Gail Elliot, individually ("respondents"); and Dr. Barry Bricklin, individually, ("expert respondent") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1.

(a) Buckingham Productions, Inc., trading and doing business as

* The Decision and Order following this Complaint applies to respondent Dr. Barry Bricklin only. The Complaint against the other named respondents remains in litigation.

Rotation Diet Center, 4131 Swamp Road, Doylestown, Pennsylvania; Furlong-Elliot Corp., 73 Valley Drive, Furlong, Pennsylvania; Freedom Center, Inc., Rotation Plaza, Furlong, Pennsylvania; Plaza Business Services, Inc., Edison-Furlong Road and Route 263, Plaza Building, Furlong, Pennsylvania; N.F. Rotation, Inc., Furlong, Pennsylvania; and Rotation-Freedom Diet, Inc., Box 315, Health Plaza, Furlong, Pennsylvania, are Pennsylvania corporations.

(b) Furlong-Elliot Corp. dominates and controls the acts and practices of its wholly-owned subsidiaries, Buckingham Productions, Inc.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; and Rotation-Freedom Diet, Inc.

(c) Howard Elliot is an officer of Furlong-Elliot Corp. Howard Elliot and Gail Elliot formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. Their address is 73 Valley Drive, Furlong, Pennsylvania.

(d) Judy Ruthrauff is an officer of Buckingham Productions Inc.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; and Rotation-Freedom Diet, Inc. Ruthrauff formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices alleged in this complaint. Her address is R.D. 1, Box 252A, Riegelsville, Pennsylvania.

(e) Dorothy Woolslager is an officer of Buckingham Productions, Inc.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; and Rotation-Freedom Diet, Inc. Woolslager formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Her address is R.D. 1, Box 24, Carversville-Wismer Road, Pipersville, Pennsylvania.

(f) Benito Ventresca is an officer of Buckingham Productions, Inc.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; and Rotation-Freedom Diet, Inc. Ventresca formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His address is 4716 Woodfield Circle, R.D. 4, Doylestown, Pennsylvania.

(g) Dr. Barry Bricklin is a clinical psychologist, with a doctor of philosophy degree in psychology, and a license to practice psychology in Pennsylvania. He is now and at all material times has been an associate professor of clinical psychology at Hahnemann University. His address is 470 General Washington Road, Wayne, Pennsylvania. Expert respondent Bricklin possesses an expertise in psychology, and in the physiological and psychological aspects of dieting, superior to that generally acquired by ordinary individuals.

PAR. 2. Respondents manufacture, offer for sale, and sell weight

reduction and/or weight control programs and products. Expert respondent Dr. Barry Bricklin, for his part, developed some of the basic principles upon which the weight reduction and/or weight control programs offered for sale through the corporate respondents are based. Expert respondent Bricklin has had a continuing role in the marketing of these programs by serving as the Director of the programs' Professional Advisory Board, and by providing advice concerning the products and programs to Howard Elliot, to other respondents, and/or to employees of the respondents as requested. In addition, expert respondent Bricklin has aided in the promotion and sale of these weight reduction and/or weight control programs and products by providing as an expert in the field endorsements of the efficacy of the programs and products that appear in advertisements. The advertisements in which expert respondent Bricklin's endorsements appear depict him as possessing an expertise in psychology, and in the physiological and psychological aspects of dieting, superior to that generally acquired by ordinary individuals.

PAR. 3. Respondents have disseminated or caused to be disseminated, advertisements for weight reduction and/or weight control programs and products that include a "food" and/or a "drug" within the meaning of these terms in Section 12 of the Federal Trade Commission Act. These advertisements, some of which contain expert respondent Dr. Barry Bricklin's endorsement, have been disseminated (a) by United States mail, or in or having an effect upon commerce by any means for the purpose of inducing, or which have been likely to induce, directly or indirectly, the purchase of food and/or drugs, or (b) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food and/or drugs.

PAR. 4. The acts and practices of respondents and expert respondent Dr. Barry Bricklin alleged in this complaint have been in or affecting commerce.

PAR. 5. Typical of respondents' advertisements, but not necessarily inclusive thereof, are the advertisements attached hereto as Exhibits A through L. Specifically, the aforesaid advertisements contain the following statements:

(a) Women usually lose 8 to 20 pounds a month, men 12 to 25 pounds [on the Rotation Diet].

(b) [. . . The] "No Frills" Rotation Diet Plan . . . works just like the original Plan. It's just as safe, just as effective. . . .

(c) Now you can truly eat whatever you want, as much as you want without feeling guilty and you'll still lose weight.

(d) The all natural diet—no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!

(e) My total loss so far has been 62 pounds . . . There are thousands of Rotation Diet Center Members who've lost as much weight as I have. Even more!

(f) Reach your goal then keep it off with the Rotation Diet Maintenance Plan.

(g) . . . [R]eal breakthrough [of the Rotation Diet] is the unique way it allows a person to find his or her right weight and then stay there.

(h) Once you reach your weight goal, you only diet two days each week. Then as your body adjusts to its new weight, you diet just one day a week. You'll be able to stay slim all your life . . . comfortably and easily.

(i) Q. What do the [Rotation] tablets do?

A. They stop all hunger and increase your energy level.

(j) Rotation Wafers makes (sic) the diet work. They're critical to the success of the diet because they: STOP HUNGER (yet they're not a medicine, drug, or shot, so they're perfectly safe) . . . ELIMINATE FATIGUE. . . .

(k) Take-A-Break Tablets are specially formulated to work with the Rotation Diet and help to keep food from turning to fat. This means that for one day, two days, any number up to 15 days, you can enjoy taking a break from your Rotation Diet. Soon as you . . . get back on the Rotation Diet . . . in one week or less you'll be back at your "Pre-Break" weight.

(l) [I]t saves you more than it costs. . . . *You'll save more than you spend on this diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week.

(m) Q. How much weight can I really lose on the FREEDOM DIET?

A. . . . [A]s a rule, women usually lose anywhere from 8 to 20 pounds the first month; men up to 25 pounds.

(n) The Freedom Chewable Tablets are the key to your weight-loss success. They contain no medicine or drugs, yet they stop hunger and help you to feel good on your diet day.

(o) Q. Can the FREEDOM DIET harm me in any way?

A. No. Our experience is that the diet when followed accurately, takes off weight safely and naturally.

(p) After You Reach Your Goal, It's Easy to Maintain. Once you've lost all the weight you want, it's easy to keep it off because FREEDOM DIET has a special Maintenance Program. You'll reduce your Diet Days to 2 per week . . . then as your system adjusts to your new weight, you'll cut back to just 1 diet day per week and you'll be able to stay slim for the rest of your life!

(q) Here's how the FREEDOM DIET works: This amazing diet actually let you eat and drink what and whenever you want on TUESDAYS, THURSDAYS, SATURDAYS AND SUNDAYS. You can have foods like spaghetti, ravioli, fettucini, and pizza. Bread and potatoes too. And desserts like chocolate layer cake, ice cream, banana splits, sundaes, pecan pie with whipped cream—whatever your favorites might be! You can even have double helpings of everything because that's the whole idea of the FREEDOM DIET. You're FREE to eat anything you want, as much as you want 4 days every week.

(r) Our "Make-A-Break" Plan will help you maintain your weight for up to 15 days when you have to take a break from FREEDOM DIET.

(s) [T]he majority of women [on the Rotation-Freedom Diet] fit within range of 8 to 20 pounds loss during the first month, men usually lose more.

(t) Take-A-Break Tablets [in the Rotation-Freedom Diet] let you go off your diet for 9 days without regaining.

PAR. 6. Typical of the statements in endorsements authorized by expert respondent Dr. Barry Bricklin, which appear in respondents'

advertisements, and are attached hereto as Exhibits A and I, are the following:

Q. Does the Rotation Diet really work? Do people lose weight on it?

A. It works extremely well. But as any doctor with years of experience in weight control knows, designing a way to lose weight is only a small part of the challenge. My years of observation of this diet convince me that its real breakthrough is the unique way it allows a person to find his or her right weight and then stay there. . . .

Q. How much weight can I lose?

A. Women usually lose 8 to 20 pounds a month, men 12 to 25 pounds. The amount depends on many personal variables, including the total amount of weight you have to lose. . . .

PAR. 7. Respondents' advertisements also contain the following statements, which purport to be actual and genuine testimonials from customers of the Rotation Diet Center:

(a) "The Rotation Tablets taste like Necco Wafers. They really stop my hunger and increase my energy level. I feel good on my 3 diet days!" E.R., Boston, Massachusetts

(b) "I really pig-out on my free days—pizza, cheesecake, beer, potato chips. I eat to my 'heart's content' and have still lost 57 pounds!" N.M., Princeton, New Jersey

(c) "I save enough on my 3 diet days to more then pay for the whole week. The diet actually costs me nothing!" J.A., Stowe, Ohio

(d) "The all natural diet—no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!" C.D., Wilmington, DE

(e) "I just used your switching process to make Wednesday a FREE DAY—it worked great!" A.Z., Hartford, CT

(f) "I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week." S.R., Los Angeles, CA

(g) "I've lost over 70 pounds while eating all of the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!" P.A., Philadelphia, PA

(h) "I've lost over 70 pounds while eating all of the ice cream I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!" D.C., Norristown, PA

PAR. 8. Respondents' advertisements also contain photographs of individuals accompanied by the following statements:

(a) I'm Dottie Woolslager. I'm thin for the first time since the kids came, and I know I'll never be fat again. I found the Rotation Diet, the only diet I've ever been able to live with. . . .

I'm so pleased about what happened to me, I'd love to help it happen to you. . . .

I'm beginning to feel like a celebrity. Hundreds of people have been calling me personally, asking, "Why did you pick the Rotation Diet?". . . . They had read about me and The Rotation Diet, and seen how successful I was. But they weren't sure they could actually do it themselves.

That's why I volunteered to let The Rotation Diet Center relay calls to my home. I want to help spread the word about this wonderful diet. . . .

P.S. I'm no celebrity. I'm someone exactly like you, who's just a few months ahead of you on the Rotation Diet Program. . . .

(b) I'm Judy Ruthrauff. After the birth of my last little girl, I couldn't get rid of 23 pounds. I was always hungry, and I ate enormous amounts of diet food until I discovered The Rotation Diet. It really worked for me. It not only got the weight off, it got me feeling good about myself again.

PAR. 9. Through the use of the statements referred to in Paragraphs Five and Seven, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(a) Consumers can eat unlimited quantities of food four days a week and, regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

(b) Thousands of consumers on the Rotation Diet have lost sixty-two pounds or more.

(c) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets stop hunger.

(d) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets eliminate or prevent fatigue.

(e) Rotation Diet "Take-A-Break" tablets help keep food from turning to fat.

(f) The testimonials in Paragraph Seven represent actual and genuine consumer testimonials from customers of the Rotation Diet Center.

PAR. 10. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, referred to in Paragraph Six, and other endorsements in respondents' advertisements not specifically set forth herein, expert respondent Bricklin has made the following material representation, directly or by implication:

Consumers can eat unlimited quantities of food four days a week and, regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

PAR. 11. In truth and in fact:

(a) Consumers cannot eat unlimited quantities of food four days a week and regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

(b) Only a small number of consumers on the Rotation Diet have lost sixty-two pounds or more.

(c) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets do not stop hunger.

(d) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets do not eliminate or prevent fatigue.

(e) Rotation Diet "Take-A-Break" Tablets do not help keep food from turning to fat.

(f) The testimonials in Paragraph Seven do not represent actual and genuine consumer testimonials from customers of the Rotation Diet Center.

Therefore, the representations set forth in Paragraph Nine were, and are, false and misleading.

And therefore, the representation contained in endorsements authorized by expert respondent Dr. Barry Bricklin, set forth in Paragraph Ten was, and is, false and misleading and expert respondent Bricklin knew or should have known that said representation was, and is, false and misleading.

PAR. 12. Through their use of the photographs and statements referred to in Paragraph Eight, and others not specifically set forth herein, respondents have represented that the photographed individuals are satisfied users of the Rotation Diet and have endorsed the Rotation Diet, but respondents failed to disclose that the photographed individuals were employees of respondents. Consumers would not reasonably expect individuals so portrayed to be employees of the advertiser and that fact might materially affect the weight or credibility given to the endorsements. Therefore, respondents' representations, because of their failure to disclose such a material connection between respondents and the photographed individuals was, and is, false and misleading.

PAR. 13. Through the use of the statements referred to in Paragraphs Five and Seven, and other statements in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) Usual weight loss for women customers of the Rotation Diet is eight to twenty pounds per month, and for men is twelve to twenty-five pounds per month.

(b) Usual first month weight loss for women customers of the Freedom Diet is eight to twenty pounds. A significant portion of men lose twenty-five pounds the first month on the Freedom Diet.

(c) The Rotation Diet is safe.

(d) The Freedom Diet cannot harm consumers.

(e) The Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet include maintenance programs that are effective in enabling consumers to maintain weight loss.

(f) Consumers on the Rotation Diet "Take-A-Break" plan can cease dieting for 15 days and after one week back on the diet, will have lost all weight gained during those 15 days.

(g) Consumers on the Freedom Diet "Make-A-Break" Plan can maintain their weight for up to fifteen days without any dietary restrictions and regardless of the type and quantity of food consumed.

(h) The Rotation Diet saves consumers more than it costs.

(i) Most Rotation Diet customers save approximately 40% on their food bill.

(j) Most women customers of the Rotation-Freedom Diet lose eight to twenty pounds the first month on the diet, while most men lose even more.

(k) Customers on the Rotation-Freedom Diet "Take-A-Break" plan can cease dieting for nine days and can maintain their prior weight without any dietary restrictions and regardless of the type and quantity of food consumed.

(l) The majority of women customers of the Rotation-Freedom Diet lose eight to twenty pounds the first month on the diet; men usually lose more.

PAR. 14. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, referred to in Paragraph Six, and other endorsements in respondents' advertisements not specifically set forth herein, expert respondent Bricklin has made the following representation, directly or by implication:

Usual weight loss for women customers of the Rotation Diet is eight to twenty pounds per month, and for men is twelve to twenty-five pounds per month.

PAR. 15. Through the use of the statements set forth in Paragraphs Five and Seven, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in Paragraphs Nine and Thirteen they possessed and relied upon a reasonable basis for those representations.

PAR. 16. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, set forth in Paragraph Six, and other endorsements in respondents' advertising not specifically set forth herein, expert respondent Bricklin has represented, directly or by implication, that at the time of making the representations set forth in Paragraphs Ten and Fourteen he possessed and relied upon a reasonable basis for those representations, consisting of an actual exercise of his expertise in evaluating weight reduction and/or weight control programs and products with respect to which he is expert, in the form of an examination or testing of the programs and products

at least as extensive as someone with a similar degree of expertise would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 17. In truth and in fact, at the time of the initial dissemination of the representations set forth in Paragraphs Nine and Thirteen and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' representations, as set forth in Paragraph Fifteen were, and are, false and misleading.

PAR. 18. In truth and in fact, at the time of the initial dissemination of the representations set forth in Paragraphs Ten and Fourteen and each subsequent dissemination, expert respondent Dr. Barry Bricklin did not possess and rely upon a reasonable basis for making such representations. Therefore, expert respondent Bricklin's representations, as set forth in Paragraph Sixteen were, and are, false and misleading.

PAR. 19. Expert respondent Dr. Barry Bricklin has received compensation for the use of his endorsements in respondents' advertisements for weight reduction and/or weight control programs and products.

PAR. 20. The acts or practices of respondents and expert respondent Dr. Barry Bricklin as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements and endorsements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioners Bailey and Azcuenaga dissented as to the inclusion of Dr. Barry Bricklin as a respondent.

EXHIBIT A

Lo_rs Are Winners

With Rotation Center's Revolutionary Weight-Loss Program

It's easy because it's the diet you can live with.

You can eat anything you want...without guilt...without injuring your health...without drugs...without being hungry all the time.

There are no special foods to buy...no weighing out portions...no calorie counting...no exercising. In fact, people don't even need to know you're on a diet. Best of all, you're never more than 24 hours away from the best meal of your life!

Think it's impossible? It's not! Read on for complete details...

The Rotation Diet Will Work For You, Too!

Now you can truly eat whatever y[ou] want, as much as you want w[ithout] feeling g[uilty] and you'll still lose weight. It[']s impossible. In fact, it's easy!

Here's how the Rotation Diet works:

FREE DAYS

Tuesday, Thursday, Saturday, and Sunday are FREE DAYS. You eat and drink whatever you like — good food or junk food — as much as you want. Not just ice cream but a sundae with fudge sauce, whipped cream, nuts, a cheeseburger and french fries, double orders if you're hungry! pretzels and beer absolutely anything you want!

For 4 days a week you're eating the way you like to eat. FREE DAYS are your "reward" days and they are what makes the difference between your staying on the diet and giving up. Most people give up diets because they're bored with the same foods or bothered counting calories or tired of buying special, and frequently, expensive foods. There's none of that with the Rotation Diet.

The Rotation Diet is the diet you can live with and stick with. After you reach your weight goal, you'll get more FREE DAYS each week — up to 6 out of 7.

We call the Rotation Diet the "no-one has-to-know you're on a diet" diet. That's because of its special switching day feature. It lets you enjoy all special days without messing up your diet.

It won't be difficult for you to remember your FREE DAYS. And when you look at the month, you'll see that FREE DAYS far outnumber the others.

S ree y	M Diet Day	T Free Day	W Diet Day	T Free Day	F Diet Day	S Free Day
	1	2	3	4	5	
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

BALANCE DAYS

Monday, Wednesday, and Friday are BALANCE DAYS. On these days you follow our special program which includes Rotavon Wafers and Rotation Mini-Vitamins. We also give you simple, quick recipes for additional delicious foods. In addition, you get unlimited private consultation with the Rotation Diet Center and your personal Phonefriends.

Rotation Wafers make the diet work. They're crucial to the success of your diet because they STOP HUNGER without medicine or drugs, PROVIDE ENERGY with a unique combination of healthful, high energy, natural ingredients, ELIMINATE FATIGUE so you can do anything you want on a Balance Day, from early morning to late at night.

Rotation Wafers allow your system to operate much like it does on your "eating" days.

Rotation Diet is not a "mass program" that's the same for everyone. The amount of Rotation Wafers you must take is based on your answers to the questionnaire and determined by a Rotation Center Diet Counselor.

Optional Rotation Foods make the diet even easier for you to live with. And you can have all the diet soda, coffee, tea or water you want. Additional foods will be added later by your personal counselor.

Rotation Diet doesn't have fast days because the "feed and fast" method doesn't work. It often causes dizziness and fatigue. And when hunger pangs strike, most people end up eating on their fast days. But with the Rotation Diet you have Rotation Wafers, beverages and food. 3 BALANCE DAYS each week. You also have 4 FREE DAYS when you can really live it up and satisfy your cravings. The day after each of these you won't have any trouble doing without your favorite foods because you'll know you can have as much as you want of them in less than 24 hours!

A.J. Robbins, M.D.

Dr. Robbins, our newest member of the Professional Advisory Board, is a well known thoracic surgeon. Her experience in the field of nutrition began at St. Peters College where she was been the Director of Health Services and the team physician since 1962. She has continued her recent comprehensive work in nutrition at Fairleigh Dickinson University, where Dr. Robbins lost 21 pounds in 2½ months on the Rotation Diet.

One can diet safely and sanely on the Rotation Diet Program. Everywhere under medical care for specific conditions can advantageously use this diet with their medical regimen."

A.J. Robbins, M.D.

Meet Another Member Of The Advisory Board...

Dr. Barry Bricklin is Director of Rotation Center's Professional Advisory Board. He works with physicians, nutritionists and other scientific specialists to evaluate the plan and develop recommendations.

About 13 years ago Dr. Bricklin weighed over 220 pounds. He's 5'8" tall. He lost 75 pounds with an earlier version of the Rotation Diet and has maintained his desired weight of 145 pounds for 12 years with the current plan.

Currently Dr. Bricklin is an associate professor of psychology at Hahnemann Medical College in Philadelphia. Previously, he's served Jefferson Medical Hospital, Walter Reed Army Hospital, E.I. DuPont Company, New York Academy of Medicine and the Columbia Broadcasting System (CBS).

The Rotation Diet Advisory Board Answers Your Questions...

Q: **Does the Rotation Diet really work? Do people lose weight on it?**

A: It works extremely well. But as any doctor with years of experience in weight control knows, designing a way to lose weight is only a small part of the challenge. My years of observation of this diet convince me that its real breakthrough is the unique way it allows a person to find his or her right weight and then stay there.

Q: **Is the Rotation Diet medically safe?**

A: You take no drugs or medications with this diet. However, we do encourage you to discuss Rotation Diet with your doctor before starting this or any diet.

Q: **What do Rotation Wafers contain?**

A: They contain only natural ingredients specially formulated to make the diet work. They include soy flour, honey, non-fat dry milk with malted milk, soy isolate and, of course, vitamins, minerals, iron, potassium, magnesium and stearate exponates. The nutritive value of each wafer is 45 grams protein, 1 gram carbohydrate, 1 calories per wafer.

Q: **How much weight can I lose?**

A: Women usually lose 4 to 10 pounds a month; men 5 to 15 pounds. The amount depends on many personal variables including the total amount of weight you have to lose.

Q: **Can I buy Rotation Wafers at my drug store?**

A: No. Our special weight loss wafers are manufactured exclusively for the Rotation Diet Center and are available only from us.

If you have a question about the Rotation System

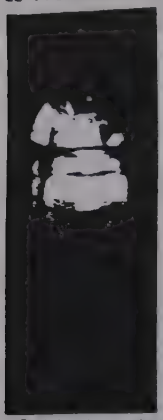
Our Professional Advisory Board will answer as many questions as possible in future issues of our Newsletter "Rotation Rescue." Send your questions to the **Professional Advisory Board**
c/o Rotation Center Rotation Plaza
Furlong, PA 18925

DON'T WAIT ANY LONGER — ORDER TODAY AND JOIN THE THOUSANDS OF OTHER ROTATION DIET WINNERS!

(See your enclosed personalized form for complete order instructions.)

The Diet You Can Live With. Does It Really Work?

It Worked For Dot Woolslager...



Dot before she started the Rotation Diet

Dot now 62 pounds lighter

and she ate cheesecake, fettucine, ice cream sundaes, Tia Marias and all the other foods that she loves! Here's Dot's fabulous success story.

I started the Rotation Diet on April 23, 1979. By the end of the summer I had lost 45 pounds, dropping my weight from 185 to 145 pounds. I was beginning to "rejoin the human race."

Since then I have been able to enjoy a modified maintenance program (fewer diet days) and still my weight continues to drop! My original goal was 130 pounds, but now I'm down to 123 pounds with a new goal of 115. I've lost a total of 62 pounds so far. Translated, that's over 29 inches (see my chart below). I'm almost down to the same weight as when I was a teenager. My skin is tight and I feel great!

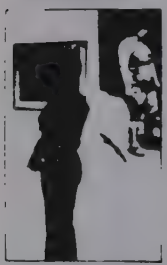
I'm very proud of the way I look now — and looking good makes me feel good. My family is also very proud of the dramatic change in their "old" Mom. And although my husband was extremely understanding during my fat years, I know he enjoys having his "bride" back. (And I enjoy being back!)

I just bought a new dress — size 9/10 — that shows off my legs, and I couldn't help but think how truly miraculous the Rotation Diet has been for me.

Not only have I lost 62 pounds and 29 plus inches, but I've been able to enjoy all the foods I love during this diet without that nagging guilty feeling.

The Rotation Diet has transformed my life and I know it could do the same for you.

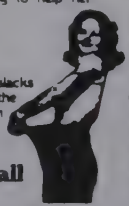
Dot's statistics	Before	Now
WEIGHT	185 lbs.	123 lbs.
WAIST	34"	26"
HIPS	43"	36"
CHEST	35"	34"
NECK	13"	11"
THIGH	22"	15½"
CALF	13"	10"
UPPER ARM	12"	10"



It worked for Arlene...

Here's Arlene H. at 218 pounds before the Rotation Diet. And here she is at 143 pounds. Her goal is 125 and Rotation Diet is going to help her get there!

It worked for Judy...



Here I am with the slacks I used to wear before the Rotation Diet. Now I'm 23 pounds lighter!

And it worked for all these people, too!

Name	Pounds Lost	Name	Pounds Lost
Pat	74	Ann	40
Arlene H.	53	Linda	52
Bill	31 in 30 days	Bill	30
Bob	10 in 1 week	Jean	10 in 2 wks. 24 total
Barry	25 & maintaining	William	50
Ann	40	Judy	25
June	[illegible] in 1 week	Maxine	15 in 2 weeks
Mary	16	Ruth	25 and maintaining
[illegible]dy	24	Jerry	25
[illegible]ie	23	Janice	13 in 3 weeks
[illegible]mary	25	June	25

Plus tens of thousands more!

With the Rotation Diet, losers are winners. Wouldn't you like to see your name added to our list of winners? Start the Rotation Diet now and it won't be long before you too are saying, "I'm a losing winner with Rotation, and I feel great!"

In fact, people from all walks of life have become winners with the Rotation Diet.

Just look at all the professions represented by Rotation Dieters from all across the country.

housewife	politician
physician	dress shop owner
stewardess	computer analyst
dancer	writer
psychologist	lawyer
real estate agent	[illegible]
school teacher	[illegible]
minister	salesperson
factory worker	secretary
dentist	[illegible] professor
choreographer	medical technician
eye doctor	[illegible]
baker	[illegible] distributor
nurse	artist
student	physical therapist
teenager	banker
beautician	[illegible]
model	[illegible]
radio personality	

"I feel normal!" J.F., New York, NY

"I've lost over 70 pounds while eating all the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!"

P.A., Philadelphia, PA

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."

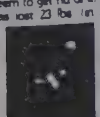
S.R., Los Angeles, CA

Meet a Few Of Your Phonefriends...

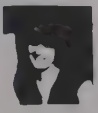
It's easy to succeed on the Rotation Diet because you don't have to do it alone. You get all the answers, all the help and support you need without attending meetings and without having to compare your weight with someone else's. Best of all, it's done by phone, toll free at no cost to you.

Just try it out right now! Call one of your new Phonefriends today — they're ready and waiting to help you.

JOY is 29 years old, 5'4", [illegible] with two children, ages three and nine, both girls. She has a large garden and enjoys canning and freezing her own vegetables. [illegible] fine until she got pregnant with her second child. She put on an extra 20 lbs and couldn't seem to get rid of it. Regular diets [illegible] any all of her snacks and the more strenuous diets made her sick. On the Rotation Diet she has lost 23 lbs (in 2½ months) [illegible] looks great!



NANCY is 34 years old, 5'9" married, with two children, ages five and nine, a boy and a girl. She enjoys ice skating, bowling, tango and buying new clothes for her new figure. Nancy has been fighting the "battle of the bulge" for about ten years. Three years ago she went on the Rotation Diet and has lost 32 lbs. At the time the Rotation Diet was new and maintenance procedures had not been developed. Without a maintenance program, Nancy put the 32 lbs back on. Last year she went back on the Rotation Diet and has lost 25 lbs in 2½ months. This time she will be able to use the Rotation Diet Maintenance Program and will be slim for the rest of her life.



VICKI is 28 years old, she's been married eight years and has two children. Vicki is one of those girls who really has to fight to keep her weight down. Keeping after a family with three different schedules and eating habits certainly doesn't make dieting easy. Since starting the Rotation Diet eight weeks ago, Vicki has lost 22 pounds. Soon she will reach her goal — and be able to stay there! Vicki enjoys hobbies and crafts and at the present time is renovating their old Bucks County home.

KAREN is 21 years old and single. She never really had a weight problem until she finished high school and went to college. The college social swirl plus the pressure of studies helped contribute 10 pounds to Karen's usual svelt frame. After business school, Karen went to work at the Rotation Diet Center and decided to try the Rotation Diet. She quickly lost the extra ten pounds and is now enjoying the freedom of the maintenance program. Karen is an "outdoorsie," people person. (She enjoys being with people, talking to people, and enjoying people.) Her hobby is art and drawing.

MARYANN is a 38 year young grandmother who has been married 23 years. She has three children — two girls and one boy — and 4 grandchildren. She works as a nurse and lives on a small farm raising beef cattle and ducks. She has lost 30 pounds and 25½ inches in four months on the Rotation Diet. Her interests include hunting, fishing, skiing, eating, ice and roller skating and the Rotation Diet.

PROMPT CONFIDENTIAL SERVICE

Orders Filled In 1 Day!

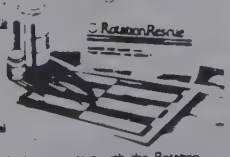
We know that when you decide to go on a diet you want to start NOW. With this in mind, we are geared to process all new orders the same day they are received. We ship by UPS which means that usually you receive your materials in 2 to 5 days.

Plus — you can call us TOLL FREE any day of the week between 8a.m. and 11p.m. Eastern time. Call to place an order, call if you have questions, call if you just want to share your weight loss success — or call if you need a little encouragement!

TOLL FREE 900-523-5763

We invite you to visit us if you pass our way. We'd love to meet you in person and hear about your success with the Rotation Diet. Come see us soon!

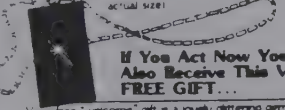
Here's What You'll Receive When You Join Rotation Center's Revolutionary Weight Loss Program...



Your personalized Rotation Diet Kit will include all of the following:

- Rotation Wafers (the key to success)
- Rotation Multi-vitamins
- Instruction Handbook
- Calendar
- Free Subscripoon to our special newsletter, "Rotation Rescue"

And of course you get unlimited telephone contact with the Rotation Center and your Phonefriends!



If You Act Now You'll Also Receive This Very Special FREE GIFT...

Your free "welcome" gift is a lovely glittering gemstone ingot sterling silver exquisitely covered with 24 karat gold with a hand cut gemstone set in the center. You'll also receive a free gold covered frame and 18 inch gold filled serpentine chain!

Each ingot has been handcrafted expressly for the Rotation Center through a special arrangement with the Buckingham Mint. These exquisite ingots weight 2 grams and measure 11 mm by 21 mm — perfect to display or wear as a necklace or on a charm bracelet. You choose the gemstone you want: EMERALD • RUBY • SAPPHIRE • PEARL • PERIDOT • TOPAZ • GARNET • CUBIC ZIRCONIA • AQUAMARINE • TURQUOISE • OPAL • AMETHYST

So don't wait — this is a $22.00 value and it's yours free when you act by the deadline shown on your enclosed Membership Form.

As extra incentive, we have a special program where you can receive FREE gold and silver ingots when you reach your weight loss goals. Complete details will be included in your Membership Kit.

"Everyone has one problem or another during weight loss, but on this diet, you get the answers and all the help you need."

C.T., Toronto Canada

"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY AND SUNDAY!"

M.A., Norristown, PA

MONEY BACK GUARANTEE

The Rotation Diet has been so successful that we never needed to guarantee it. However, we want to put your hesitancies aside — we want to let you know this is a great offer. So we guarantee to refund the full purchase price of your unused Wafers & Vitamins if you're not completely satisfied. Use the wafers and vitamins exactly as prescribed for 2 weeks. If you don't lose the weight established by your goal, return the unused portions within 30 days of original order. We guarantee to send you a refund based on the unused portion of supplies, not including membership set-up fee. (Guarantee valid only if supplies are accompanied by original invoice. Not responsible for returns not received — recommend "receipt requested" mailing.) Don't wait any longer! Get the diet you can live with – ORDER TODAY!

EXHIBIT B

Discover
DIET FREEDOM with
The FREEDOM DIET
Read what glamorous
Barbara Eden
Star of "I Dream of Jeannie" and "Harper Valley" has to say about The Freedom Diet.
"No wonder homemakers, business people, workers everywhere have chosen The Freedom Diet. It's fantastic."
Now, You too can Discover Diet Freedom with the Safe, Simple and Affordable Freedom Diet. You can eat anything you want 4 days a week and still lose weight.

Eat AND Lose...
the FREEDOM DIET gives you the freedom to eat while you lose weight
No more fighting will power no more guilt no more changing your lifestyle!
DIET DAYS ARE EASY
NO MANDATORY EXERCISING
EAT ONE DAY
GET THE FREEDOM
FREEDOM FRIENDS
OUR "MAKE A BREAK" PLAN

Now you can eat whatever you want...as much as you want.

The New FREEDOM DIET—It's safe, simple and affordable.

Here's how the FREEDOM DIET works:

This amazing diet actually lets you eat and drink what and whenever you want on **TUESDAYS, THURSDAYS, SATURDAYS AND SUNDAYS.** You can have foods like spaghetti, ravioli, lettuce and pizza. Breads and potatoes too. And desserts like chocolate layer cake, ice cream, banana splits, sundaes, pecan pie with whipped cream - whatever your favorites might be! You can even have double helpings of everything because that's the whole idea of the FREEDOM DIET. You're FREE to eat anything you want, as much as you want 4 days every week.

The other 3 days a week—**MONDAYS, WEDNESDAYS AND FRIDAYS**—are your Diet Days, and on these days you follow a simple weight loss program. You'll lose weight with Freedom Chewable Tablets. And you won't suffer from hunger pangs or experience dizziness or fatigue. You'll be able to drink all the diet soda, coffee and tea you want. And there are even optional foods you can have on these Diet Days (they'll be explained in your Instruction Book).

The **Freedom Chewable Tablets** are the key to your weight loss success. They contain no medicine or drugs, yet they stop hunger and help you to feel good on your diet days.

S	M	T	W	T	F	S
Freedom Day	Diet Day	Freedom Day	Diet Day	Freedom Day	Diet Day	Freedom Day
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

By following the FREEDOM DIET 4 days a week, you can lose up to 20 pounds the first month! And best of all, nobody has to know you're on a diet because FREEDOM DIET has a special plan for watching your Freedom Days and Diet Days. It lets you enjoy special days without messing up your diet.

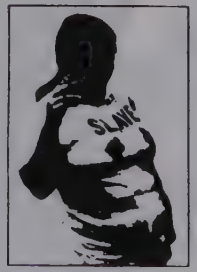
After You Reach Your Goal, It's Easy To Maintain

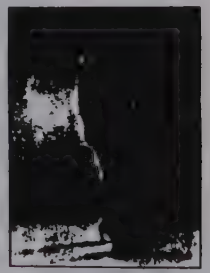
once you've lost all the weight you want, it's easy to keep it off because FREEDOM DIET has a special Maintenance Program. You'll reduce your Diet Days to 2 per week - then as your system adjusts to your new weight, you'll cut back to just 1 diet day per week and you'll be able to stay slim for the rest of your life!

It's Safe - And It's Sane

The FREEDOM DIET contains no drugs or medications of any kind. It's a food product. Ask your doctor about it. Have him call us if you like.

It's sane because it just makes good sense to choose a diet that doesn't deprive you of all the foods you love. And because it doesn't deprive you, it's easy to stick with the FREEDOM DIET. You'll lose all the weight you want to lose - and you'll be able to keep it off!





Kathy Used To Weigh 180 Pounds...Today She Weighs 126 Pounds

My Mother and sister and my grandmother were all heavy. And I was heavy. I continued to gain weight over the years until I reached 180 pounds. I carried that weight around for three years. And the one day I looked at myself in the mirror ... really looked! I decided I couldn't stand myself another day."

So Kathy went on a diet. She tried one diet after another with OK results— losing until she would start to cheat and the weight would begin to come back. She simply couldn't give up all those scrumptious and fattening foods she loves so much. So she always ended up cheating - and feeling guilty.

Then Kathy heard about the FREEDOM DIET - a diet that lets you eat anything you want 4 days a week. "It was hard to believe," she said, "but I decided to give it a try. I had plenty of weight to lose, plus I wanted to stop jumping from diet to diet."

Today Kathy weighs 126 pounds. "It wasn't hard to stick with it the family had cheesecake on my diet day, they'd save me a piece and I'd have it the next day."

Today Kathy is happy. Her boyfriend is happy. And her family is happy. "I never dreamed I'd ever find a diet that gives me the freedom I've found on the FREEDOM DIET. I'm so much happier with ME!"

Kathy

whenever ou want 4 days a week!

Freedom Friends Will Be Here To Help You

At Freedom Headquarters there are special people whose only [illegible] help you. Take a minute right now and meet a couple of these special Freedom Plan Friends.

Freedom Dieters Tell Us...

"I'm a guy and frankly I was too fat. It hindered me in my work. But like to eat. A friend of mine was losing weight with the Rotation Diet. But since I'm just starting my career it's just too much dough for me to shell out. Then I heard about the FREEDOM DIET at a price I could swing. Now I've lost my first 10 pounds and I can still afford to take my girlfriend out to dinner."

"I saw the Rotation Diet on TV and it sounded simply wonderful. I wanted to get rid of at least 25 pounds but the cost of that diet was a bit steep for me. Now the FREEDOM DIET is offered at such a low price that even I can afford it."

"I needed to lose weight very badly but my husband is only working part time these days and I couldn't afford to spend a lot of money on a diet program. Then I received word about the FREEDOM DIET. I was so pleased. Your low price makes it possible for me to lose weight."

"We've been married now for just 6 months and between the two of us we've gained a total of 42 pounds. We both agreed it had to stop. We got your brochure telling us about the FREEDOM DIET. Together we've lost enough weight to fit into our wedding clothes again. Thank you!"

Freedom Headquarters Answers Your Questions

Q. How much weight can I really lose on the FREEDOM DIET?
A. Rate of weight loss varies with different people depending on how much you have to lose, your body structure and your personal eating habits. A great many women will lose anywhere from 5 to 7 pounds the first month going on the program.

Q. Can the FREEDOM DIET harm me in any way?
A. No. Our experience with the diet system I have described to you has been totally safe and natural. There are no drugs or medicines.

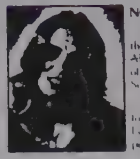
Q. What exactly do the Diet Day Chewable Tablets do?
A. These special hunger chewable tablets are the heart of your weight loss program. They are the only natural ingredient that will [illegible] your body to [illegible] without feeling fatigued.

Q. Can I buy FREEDOM DIET Chewable Tablets in the store?
A. No. These special hunger tablets are available only through us. We feel that is one of the reasons they are so reliable and dependable.

Q. Should I consult my doctor before starting the FREEDOM DIET?
A. We encourage everybody to consult their doctor before beginning any diet. However, we feel sure you will find that the FREEDOM DIET is safe and effective.

Q. Once I lose, how can I be sure I won't gain it all back?
A. Let's be realistic. You gain weight because you have developed bad eating habits. A great deal of that tendency will disappear as well. But some people will have to continue to take a few tablets each day to keep the FREEDOM DIET effect working for them. Our experience has been that [illegible] adhered to adhere to the diet [illegible] after losing weight.

Q. What about vacations, parties and other times when I will be forced to eat what is served?
A. [illegible] FREEDOM DIET [illegible] forced to eat what is served. [illegible] you can [illegible] be included with your [illegible] FREEDOM DIET.

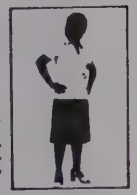


NORA CAREY Freedom Friend

Nora, a slender mother of two children, is responsible for answering many of the Freedom Diet phone calls that come in. She has been with us for over a year. Always weight conscious, Nora has kept her figure by constantly resisting lots of things she enjoys eating. Then one day she saw extra pounds slipped upon her. So she decided it was time to try out the Freedom Diet for herself.

In one week Nora lost those three extra pounds and found a fitting solution for easily maintaining its weight. Simply use the Freedom Diet one day a week. Leave it anything I want the other six days. It's a perfect way to maintain my perfect weight.

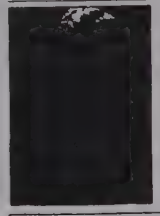
Call Nora anytime you feel anxious to talk to get your question answered or just chat. The Freedom Diet really works.



Shirley Yard Freedom Friend

Shirley Yard weighed 98 pounds as a bride and she managed to hold her slim figure even after four children. Eight years ago she gave up smoking and her weight began to creep up. She decided to try the Freedom Diet and has lost 27 pounds in less than 12 weeks.

I find the Freedom Diet very easy to follow. On Mondays, Wednesdays and Fridays I eat my chewable tablets and drink my water. The other four days, Tuesdays, Thursdays, Saturdays and Sundays, I eat whatever I want. I love steaks with fried onions, pizza and banana splits are my special favorites. This diet has become a way of life for my family. My husband loves it because we can go out to eat and my mother is now on the program. Give me a call if you want to talk to someone who is losing weight and is very excited about the Freedom Diet.



A PERSONAL MESSAGE FROM BARBARA EDEN

It's easy to understand why thousands upon thousands of people on The Freedom Diet write to tell us that this is really a diet you can live with. It just makes good sense: you can eat all the foods you love and still be on a diet.

If you want to lose weight, take it from me, you will never find another diet that is so easy, works so well and lets you eat anything you want four days a week. The Freedom Diet is fantastic!

Barbara Eden

Don't wait any longer—take your first step to diet freedom by completing and mailing your enclosed personalized order form today. You'll be glad you did!

THE FREEDOM DIET™

Freedom Headquarters ★ Washington Crossing, Pennsylvania 18977

215-794-3255 or 215-794-5643

NOW FOR THE FIRST TIME YOU CAN GET ALL THE ADVANTAGES OF A ROTATION DIET BUT AT A BARGAIN PRICE!

Eat anything you want [illegible] as much as you want [illegible] 4 days a week [illegible] the weight you want [illegible]

Dear Friend

If you're like me, you've read all about the "Rotation Diet" that so many people have been using. It's true that it works. But it's also true that it's expensive — you have to pay a membership fee in order to use the diet program, and then of course you have to pay a high price for the diet itself.

It's for this reason that I'm writing you today. I'm very pleased to be able to tell you about the FREEDOM DIET. It's the same kind of diet, and it doesn't cost you nearly as much. You get the same advantages, the plan works the same way, and the Freedom Chewable Tablets do the same job. The big difference is the price!

If you're wondering how we can make this offer, let me explain. You save money because:

● we don't have big, costly newsletters ● we don't have a toll-free phone line ● we don't send you separate vitamins—they're included as part of the Freedom Chewable Tablet ● we don't waste money on fancy packaging ● we don't charge you a costly membership fee ● we don't promise expensive 1 day service, but we do process all orders within 5 days.

But are you getting a real "Rotation Diet"? Yes. And as you will see when you read the enclosed brochure, there are thousands of people who have already lost many pounds with the FREEDOM DIET. [illegible] freed themselves of unwanted weight safely and easily, and saved money at the same time.

Just like me, these people found that the FREEDOM DIET gives them the freedom to eat while they lose weight. There's no more fighting will power, no more guilt, no more need to change your lifestyle because you can eat whatever you want, as much as you want whenever you want 4 days a week—including Saturday and Sunday!

Imagine losing up to 20 pounds the first month without having to give up all the fattening foods you [illegible]. Like cakes and pies, bread and potatoes, ice cream and candy, pasta, pizza and other fast food. With the FREEDOM DIET you can keep right on eating all these wonderful foods and still lose weight.

Even after you've reached your weight loss goal you needn't worry about gaining all those unwanted pounds back again. FREEDOM DIET has a special weight maintenance plan to keep you slim.

So what are you waiting for? Read the enclosed brochure for complete details and then order your own FREEDOM DIET Kit today. See for yourself how you can have the freedom of eating while you lose—without it costing you a fortune.

Sincerely,

Barbara L. Thompson

Barbara L. Thompson
Director, Freedom Diet Headquarters

P.S. We've enclosed a special personalized order form and postage paid return envelope for your convenience. However, if you wish, you can call us at **215-794-3255 or 215-794-5643** and place your order immediately. We accept Visa, MasterCard, American Express and Diners Club.

THE FREEDOM DIET™ Order Form

Freedom Diet Headquarters ★ Washington Crossing, Pennsylvania 18977

DIET FREEDOM with the FREEDOM DIET

Special Diet Opportunity For:

Now You Can Eat Whatever You Want...As Much As You Want Whenever You Want 4 Days A Week And Still Lose All Those Unwanted Pounds!

And that's exactly what you'll get—the freedom to eat whatever you want while you lose weight ★ without exercising ★ without pills or drugs ★ without counting calories ★ without special [illegible]s ★ without getting dizzy or fatigued [illegible] THOUT GUILT. Best of all you get all the [illegible]antages of the "Rotation Diet" but at a bargain [illegible]. There are no membership fees. No office visits or consultation fees.

It's Easy To Begin The FREEDOM DIET

Here's all [illegible] to do:

1. Complete the form at right. There are additional order blanks on the reverse for your friends.

2. Be sure to fill in your credit card information and sign if you are charging your order.

3. Mail your order form (and payment if paying by check or money order) in the handy postage paid envelope we've provided for your convenience.

IF YOU PREFER, you can phone in your order. Just call 215-794-3333 or 215-794-3641 any day of the week, including Saturday and Sunday, between 8 a.m. and 11 p.m. eastern time.

"Whatever you do, don't wait any longer. Take your first step to diet freedom by ordering your own FREEDOM DIET Kit today!"

Name _____

Address _____ Apt _____

City _____ State _____ Zip _____

[illegible]

☐ **YES!** I want to get diet freedom with the FREEDOM DIET. Please send me the following right away:

☐ **1 FREEDOM DIET KIT** (4 week supply)
$39.95 (we pay postage & handling) ..... $39.95 total

☐ **1 FREEDOM DIET KIT** (2 week introductory offer)
$19.98 + $3.75 postage & handling ..... $23.73 total

Where did you first hear about the FREEDOM DIET? _____

Please check one:

☐ check ☐ money order (no C.O.D.s) made payable to FREEDOM DIET OR ☐ VISA ☐ MASTERCARD ☐ AMERICAN EXPRESS ☐ DINERS CLUB

Card # _____ expiration date _____

Date _____ Signature _____

Phone # _____

If you wish you may add $4.00 for each kit for UPS AIR delivery if you live in one of these states: AL AK AZ AR CA CO FL GA HI ID IL IN IA, KS KY LA MI MN MS MO MT NE NV MN ND OK OR SD TN TX UT WA WI WY

Additional order forms for your friends on the back.

Now You Can Get Bathing Suit Freedom With The Freedom Diet!

If you feel a little self-conscious when you slip (or struggle) into your swimsuit, then you need the **FREEDOM DIET!** It's the safe, simple, affordable way to shed unwanted pounds **WITHOUT** giving up any of the foods you love.

No exercising...no counting calories...no special foods...no drugs... **NO GUILT.**

OUR "MAKE-A-BREAK" PLAN will help you maintain your weight for up to 15 days when you have to take a break from Freedom Diet. Enjoy your vacation...don't feel uncomfortable when you have house guests...

EXHIBIT C

ROTATION CENTER
Rotation Plaza, Village of Furlong, PA 18925

The diet you can live with

You can lose 16-20 pounds per month (comfortably, happily, eating what you like) and keep it off with THE ROTATION DIET™

ROTATION DIET™

DOES IT WORK?

Dot Woolslager Lost 82 Pounds While Eating Cheesecake Fettucine Ice Cream Sundaes Tia Marias – All The Foods She Loves – Every Tuesday, Thursday Saturday And Sunday

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

It worked for Dot Woolslager

Dot's Fabulous Success Story

I started the Rotation Diet™ on April 23 1979. By the end of the summer I had dropped from 185 pounds to 140 pounds and was beginning to "regain the human race." During these intervening months I have been able to enjoy a modified maintenance program (minus diet days) and still my weight has continued to drop. I am now down to 123 pounds with a new goal of 115 pounds. (My original goal was 130 pounds.) My total loss so far has been 62 pounds! AND hundreds of inches! (see my chart). My stum is tight and I "feel great!" I'm almost down to the same weight as when I was a "teen ager." I'm very proud of the way that I look – and looking good "makes me feel good." My family is also proud of this dramatic change in their "old" Mom. Although my husband Bob was extremely understanding during my "fat" years, I know that he enjoys having his "bride" back. (And I enjoy being back!)

I just bought a new dress – size 9-10 (one that shows off my legs) and I couldn't help but think how really miraculous the Rotation Diet™ has been. Not only have I lost 62 pounds and hundreds of inches but I've been able to enjoy all of the food that I love all during the diet – cheesecake, fettuccine, ice cream sundaes, Tia Maria on the rocks – everything that I love.

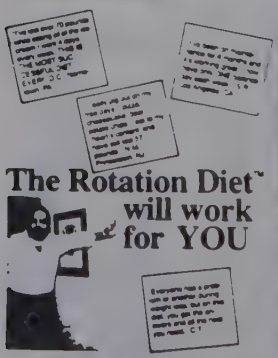
The Rotation Diet™ has transformed my life and it can do the same for you.

ROTATION DIET™
LOSERS ARE WINNERS

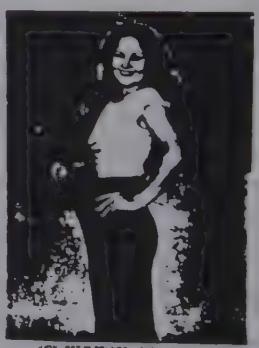
Pat	74 pounds lost	Bill	31 pounds lost in 30 days
Marilyn	59 pounds lost	Ann	45 pounds lost

Dot's Statistics	THEN	NOW
WEIGHT	185	123
WAIST	34	27
HIPS	43	37
CHEST	35	35
NECK	13	11
THIGHS	22	16½
CALF	13	11
UPPER ARM	12	10

IT WORKED FOR THOUSANDS MORE WHO LOST AS LITTLE AS 5 AND AS MUCH AS 110 POUNDS.



The Rotation Diet™ will work for YOU



JUDY LOST 23 POUNDS • SHE'S NOW AT HER GOAL

Here's how...

It's easy! It's successful! And it *saves* you more than it costs!

EAT WHATEVER YOU WANT, AS MUCH AS YOU LIKE

Tuesday, Thursday, Saturday and Sunday are *FREE DAYS* You'll eat and drink what you like – good food or junk food – anything you want! Not just ice cream, but a sundae with fudge sauce with whipped cream with nuts! A cheeseburger and french fries (double order if you're hungry)! Pretzels and beer (imagine)! Everything you want to eat in whatever quantities you choose! Absolutely no limitations!

- Four *FREE DAYS* every week. You're eating the way you like to eat.
- *FREE DAYS* are your "reward days." They make the difference between your staying on the diet and giving it up. Most people give up diets because they feel deprived of favorite foods, because they're bored with the same foods or bothered counting calories, or tired of purchasing special foods. There's none of that with The Rotation Diet.™
- The Rotation Diet™ is the diet you can live with and stick with. After you near your goal weight, you'll get more and more *FREE DAYS* each week – up to six out of seven!

SPECIAL "FLEXIBILITY" FEATURE

The Rotation Diet™ is the "no-one-has-to-know-you're-on-a-diet" Diet. That's because of its wonderful switching day program. It lets you make all special days into *FREE DAYS* without messing up your diet.

- celebrate birthdays with the cake
- at parties, join in the eating and drinking
- dine in restaurants knowing you can choose anything on the menu – and still stay on your diet
- stuff the stocking at Christmas, then stuff yourself

It won't be hard for you to remember your *FREE DAYS.* But to help you highlight these feast days, you'll find in your Rotation Diet™ Kit a supply of brightly-colored *FREE DAY* and Balance Day stickers for your calendar. When you look at the month, you'll see that *FREE DAYS* far outnumber the rest.

And it saves you more than it costs!

LOSE WEIGHT FEELING GREAT

The other three days a week – Monday, Wednesday and Friday – you'll follow our special 3 point program.

This is what makes The Rotation Diet™ *the diet you can live with.* You see, on *FREE DAYS* you'll really live it up. You'll have a feast, satisfy all your cravings. The next day you won't have trouble doing without your favorite foods. Because you'll know you can have as much as you want of them—and anything else—in less than 24 hours. And remember, every Tuesday, Thursday, Saturday and Sunday are Free Days! The Rotation Diet™ doesn't have fast days. The "feast-and-fast" method of dieting doesn't work. It often causes dizziness and fatigue. And when hunger pangs come, most people end up eating on their fast days.

The Rotation Diet™ gives you BALANCE DAYS.

- On Balance Days you'll have Rotation Wafers,™ Rotation Multi-Vitamins,™ and a number of Rotation foods. In addition, you'll have unlimited, private consultation by phone with the Rotation Diet Center and your Phonefriend—a very important part of your diet.
- *Rotation Wafers™ make the diet work.* They're critical to the success of the diet because they:

STOP HUNGER (yet they're not a medicine, drug or shot, so they're perfectly safe)

PROVIDE ENERGY (through a unique combination of healthful, high-energy, natural ingredients)

ELIMINATE FATIGUE (you can do whatever you want on a Balance Day from early morning to late at night)

- *This is a personalized, custom diet, not a "mass program" that's the same for everyone.* The amount of Rotation Wafers you must take is determined by a Rotation Diet Center counselor based on the enclosed questionnaire and then filled in by hand in your member's Instruction Handbook.
- *Rotation foods make the diet even easier to live with.* Choose from a list that includes a full 16 ounces of cottage cheese, Rotation Custard in every flavor you can imagine, Rotation Jello in every color of the rainbow, and all the diet soda, coffee, tea or water you want. Additional foods will be added later by your personal counselor.
- *You'll save more than you spend on this diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week. That more than covers the cost of The Rotation Diet™. And with The Rotation Diet™ there are no office visits or expensive consultations. You get unlimited telephone support included in your low weekly charge.

- No calorie counting
- No forbidden foods
- No drugs or medicine
- No weighing of portions
- No gadgets or machines
- No expensive office visits

Enjoy unlimited advice, support and encouragement

You'll lose more, lose faster with the help of your personal counselor.

There are 3 Very Special Ingredients In The Rotation Diet.™

THE ROTATION DIET CENTER, YOUR PHONEFRIENDS AND YOU

It's easier to succeed on *The Rotation Diet*™ because you don't have to do it alone. You get all the answers, all the help you need. Without attending meetings. Without having to compare your weight with someone else's. It's all done by phone, toll-free at no cost to you. When you start The Rotation Diet™ you become a member of The Rotation Diet Center. You get complete membership—and you never have to renew. You're a lifetime member!

Membership Benefits

CALL THE ROTATION DIET CENTER AS OFTEN AS YOU LIKE.

Toll Free (800) 523-6262

(215) 794-3278 From Pennsylvania

Or contact your Phonefriend. Their names and numbers are included in the package.

● Call daily if you need to.
We've found that people who keep in touch with the Rotation Diet Center or their Phonefriends lose weight more quickly and more easily.

● Enjoy your conversation.
The Phonefriends have actually been on The Rotation Diet™ themselves. So they know just what you're going through. Discuss whatever you want. Your Phonefriend is your friend, who understands what's happening in the rest of your life affects the progress of your diet.

● Celebrate your success.
Your Phonefriend will congratulate you every time you lose, and then give a big cheer when you've reached your goal weight and become the person you want to be.

● Keep your weight off.
Use the Rotation Diet Center to help you maintain your weight loss. Even when you're no longer ordering supplies from us.

RECEIVE A FREE SUBSCRIPTION TO PARTYLINE

You'll learn all the latest diet news, collect beauty tips, share the experience of other Diet members, gather new recipes, maybe see your own before and after pictures printed.

HERE'S WHAT YOU GET IN YOUR ROTATION DIET™ KIT:

● Rotation Waters™
2 week or 4 week supply. You choose the starting amount on your membership application.

● Rotation Multi-Vitamins™
A full 2 week or 4 week supply.

● Instruction Handbook
All you need to know, including the number of Rotation Waters™ personally allotted for you, how to switch days, how to add "FREE DAYS" and much more.

● Stickers for your "FREE DAYS"

● Calendar for the year
Record your weight loss, watch the numbers drop.

PLUS –

*****UNLIMITED TELEPHONE CONTACT WITH THE ROTATION DIET CENTER AND YOUR PHONEFRIENDS.**

Here's what you'll enjoy as a Lifetime Member of The Rotation Diet Center:

● Free telephone contact whenever you want, as often as you like—whether you're on the diet, on a maintenance program, or not receiving supplies at all.

● Free subscription to the Partyline newsletter.

CALL THE ROTATION DIET CENTER FOR MORE INFORMATION

TOLL FREE
(800) 523-6262 Seven days 9-9
In Pa. Call (215) 794-3278 Seven days 9-9

Or call a Phonefriend days, evenings, including weekends. See enclosed yellow sheet.

Call the Rotation Diet Center and use your credit card today. 9-9 Eastern Time. Your order is processed and on its way in ONE day.

2 FOR 1 SPECIAL

Find out about the special rate for you and a friend on the membership application enclosed. (Green form.)

Answers to Questions

Q. How much weight can I lose?

A. We've found that people who lose weight on The Rotation Diet™ lose an average of 1 to 2 pounds a week. But it's not unusual to lose more than that. Some people lose 3 to 4 pounds a week. Some lose even more. Most important, you lose weight safely.

Q. How long will it take me to lose the weight I want to lose?

A. Once you've reached your goal weight, you'll be the person you want to be. How many pounds you have to lose will determine how long it takes you to reach your goal. Remember, the Rotation Diet™ is a lifetime program. You'll never have to renew your membership.

Q. I stop The Rotation Diet™ for a while. Can I come back on?

A. Absolutely. Your membership is a lifetime membership with a one-time only registration fee. Just give us a call. No matter how long you've been off the diet, we'll be glad to have you back.

Q. What are Rotation Waters™?

A. They contain only natural ingredients for The Rotation Diet™. Nothing artificial. We don't use sugar substitutes. We've specially formulated it to help you lose weight. You can't have a drop or two of Rotation Waters™ during your Rotation Diet™ days. Not even a drop of vinegar. Not even a sugar-free mint. Not even a piece of sugar-free gum. Not even a sugar-free cough drop.

Q. Is The Rotation Diet™ medically safe?

A. Yes. The Rotation Diet™ is a medically safe, one balanced day [illegible] "FREE DAYS" each week and [illegible] from us.

Q. Can I [illegible] Rotation Waters™ at my drug store?

A. No. They're manufactured [illegible] and sold only by the Rotation Diet Center. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store.

Q. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store.

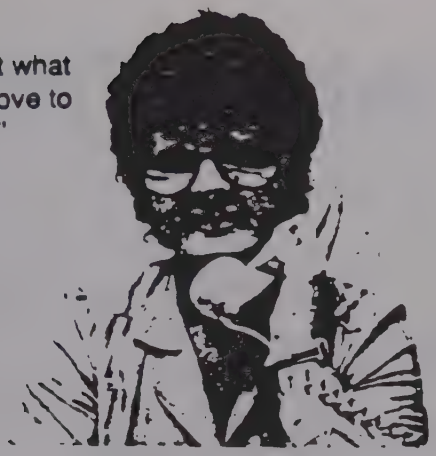
A. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store.

Q. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store.

A. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store. [illegible] Rotation Waters™ at any drug store.

115 Complaint

"I'm so pleased about what happened to me, I'd love to help it happen to you."



Talk it over with Dot herself....

Dear Friend:

I'm beginning to feel like a celebrity. Hundreds of people have been calling me personally asking "Why did you pick The Rotation Diet™?" "Didn't you feel guilty, eating so much on your "FREE DAYS", and weren't you worried you wouldn't lose weight?"

They had read about me and "The Rotation Diet™" and seen how successful I was. But they weren't sure they could actually do it themselves.

That's why I volunteered to let "The Rotation Diet" Center-relay calls to my home. I want to help spread the word about this wonderful diet.

So just call toll free (800) 523-6262 (In Penna. (215) 794-3278) and ask for Dot. I'm available most days and evenings plus weekends. I hope I'll be talking to you soon.

Sincerely,

Dot Woolslager

Dot Woolslager

P.S. I'm no celebrity. I'm someone exactly like you who's just a few months ahead of you on the Rotation Diet™ Program. And I'm not even unusual — there are thousands of Rotation Diet Center members who've lost as much weight as I have. Even more! In fact, many of these people have joined the Center as Phone Friends. And one of them would be glad to speak to you too. I've their names and numbers on the reverse side.

In Pennsylvania the Center's Number is (215) 794-3278

Return Address (please print)

Name _____

Street _____

City _____ State ____ Zip ____

BUSINESS REPLY MAIL

FIRST CLASS PERMIT NO 6 FURLONG, PA

POSTAGE WILL BE PAID BY ADDRESSEE

THE ROTATION DIET CENTER

National Headquarters

Rotation Plaza

Furlong, Pennsylvania 18925

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

EXHIBIT D

"THE DIET YOU CAN LIVE WITH!"

PARTYLINE

Published by the Phonefriend Rotation Diet®

ROTATION CENTER, Bucks County, Pennsylvania • (215) 794-3278 7 days, 9 to 9 • Outside PA (800) 523-6262 toll free, 7 days, 9 to 9

ROTATION DIET CALLED — "MOST SUCCESSFUL DIET EVER!!"

Here are some comments from the thousands of people who are currently enjoying the Rotation Diet:

"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY and SUNDAY!"

"I feel normal!"

"I've lost over 70 pounds while eating all of the ice cream that I want 4 days every week. *THIS IS THE MOST SUCCESSFUL DIET EVER!*"

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."

"The Rotation Tablets taste like Necco Wafers. They really stop my hunger and increase my energy level. I feel *good* on my 3 diet days!"

"I really pig-out on my free days — pizza, cheesecake, beer, potato chips. I eat to my 'heart's content' and have still lost 57 pounds!"

"I save enough on my 3 diet days to more than pay for the whole week. The diet actually costs me nothing!"

"The all natural diet — no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!"

"I just used your switching process to make Wednesday a FREE DAY — it worked great!"

"It's wonderful to know that I'll never have to miss another 'eating day' — no more birthday parties without the cake!"

Dr. Barry Bricklin Joins Rotation Diet Staff as DIRECTOR of our Professional Advisory Board

Barry Bricklin, Ph.D. is an associate professor of psychology at the Hahnemann Medical College of Philadelphia. Previously, he served on the faculty of the Jefferson Medical College of Philadelphia. He has served as consultant in psychology to the Walter Reed Army Hospital Research Center in Washington, D.C. to the United States Army, to the E.I. duPont Company in Wilmington, Delaware, to the National Research Council in Washington, D.C., to the Near-West Academy of Medicine and to the Columbia Broadcasting System. He is past president of the Philadelphia Society for Personality Assessment. He has contributed to, co-authored, a number of books and articles on a wide variety of topics.

Among the results of Dr. Bricklin's comparative ventures with his wife Pat (also a Dr. Bricklin) are numerous articles, three books, and four children (Brian, Scott, Carol and Jillian). Two of their books have been best sellers, *Bright Child — Poor Grades: The Psychology of Underachievement*, and *Strong Family — Strong Child*. These books have been translated into nine different languages.

CONGRATULATIONS!

Pat	74 lb. loss	Ann	48 lb. loss
Antonio	53 lb. loss	Linda	54 lb. loss
Bill	31 lb. loss in 39 days	Bill	39 lb. loss
Bob	16 lb. loss in 1 week	Joan	14 lbs. in 2 wks., 24 total
Barry	39 lbs. and maintenance	William	39 lb. loss
Ann	48 lb. loss	Judy	28 lb. loss
Anita	7 lb. loss in 1 week	Madeline	16 lb. loss in 2 weeks
Mary	16 lb. loss	Ruth	39 lb. loss and maintenance
Judy	24 lb. loss	Jerry	29 lb. loss
Phyllis	35 lb. loss	Jeanne	13 lb. loss in 3 weeks
Tommy	31 lb. loss	Jeff	31 lb. loss

One Day Service
Fast and Personal

We know that when you decide to go on a diet you want to start NOW! With this in mind we are geared-up to process all new orders the same day that they are received. We ship UPS and usually the order is delivered within a day or two in the East and two or three days to the West Coast. Many orders are actually delivered the next day.

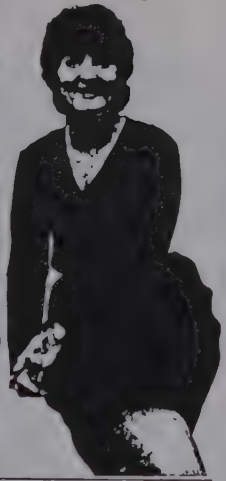
How are we so efficient? Easy — we use people not computers! My son Blair ordered a book from Time-Life and it took 6 weeks before it was delivered. He asked me every day for 6 weeks where his book was (he's 12) and I kept telling him that computers take time. He asked why they were used if they took so long and I explained that they were needed in large-scale operations. The Rotation Diet Center is relatively small. All together we are run by 75 people (up from 10 people only 12 months ago.) Don't expect Sears-Roebuck. When you call us you get a person who is on the Roatation Diet and *CARES* about *YOU!* No answering machines — no computers — just people who care!

It worked for Dot Woolslager

Dot's Fabulous Success Story

I started the [illegible] on April 23, 1979. By the end of the summer I had dropped from 185 pounds to 140 pounds and was beginning to regain the human race. During these intervening months I have been able to enjoy a modified maintenance program (minus diet days) and still my weight has continued to drop. I am now down to 123 pounds with a new goal of 115 pounds. (My original goal was 130 pounds.) My total loss so far has been 62 pounds! AND hundreds of inches! (See my chart.) My skin is tight and I feel great! I'm almost down to the same weight as when I was a teenager. I'm very proud of the way that I look – and looking good makes me feel good! My family is also proud of this dramatic change in their 'old' Mom. Although my husband Bob was extremely understanding during my 'fat' years, I know that he enjoys having his 'bride' back. (And I enjoy being back!)

I just bought a new dress – size 9-10 (one that states all my legs) and I couldn't help but think how really miraculous the [illegible] has been. Not only have I lost 62 pounds and hundreds of inches but I've been able enjoy all of the food that I love all during the diet – cheesecake, fettucine, ice cream sundaes, Tia Maria on the rocks – everything that I love. The Rotation Diet™ has transformed my life and it can do the same for you.



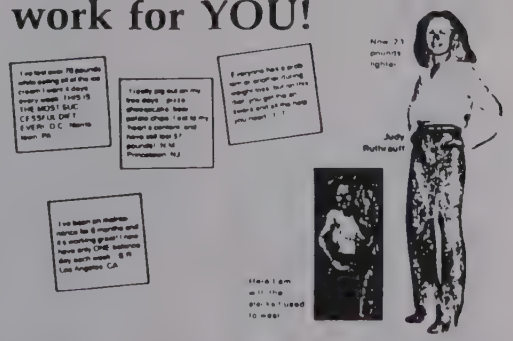
ROTATION DIET™
LOSERS ARE WINNERS

Pat—74 lbs. lost
Bill—31 lbs. lost in 30 days
Arleen—53 lbs. lost Ann—40 lbs. lost

Nancy lost 25 lbs. [illegible] 62 lbs. Marianne 30 lbs.

Dot's Statistics	THEN	NOW
WEIGHT	185	123
WAIST	34	27
HIPS	43	37
CHEST	35	35
NECK	13	11
THIGHS	22	18½
CALF	13	11
UPPER ARM	12	10

The Rotation Diet™ will work for YOU!



Here's How . . .

Tuesday, Thursday, Saturday and Sunday are "FREE DAYS." You'll eat and drink what you like – good food or junk food – anything you want. Not just ice cream, but a sundae with fudge sauce, with whipped cream, with nuts. A cheeseburger and French fries (double order if you're hungry). Pretzels and beer.

Imagine! Everything you want to eat in whatever quantities you choose! Absolutely no limitations!

- Four "FREE DAYS" every week. You're eating the way you like to eat.
- "FREE DAYS" are your reward days.

They make the difference between your staying on the diet and giving it up. Most people give up diets because they feel deprived of favorite foods, because they're bored with the same foods, or bothered counting calories, or tired of purchasing special foods. There's none of that with the Rotation Diet™.

- The Rotation Diet™ is the diet you can live with and stick with. After you near your goal weight, you'll get more and more "FREE DAYS" each week – up to six out of seven!

The Rotation Diet™ is the... no one has to know you're on a diet. Diet. That's because of its wonderful switching day program. It lets you make all specific days into "FREE DAYS" without messing up your diet.

- ... celebrate birthdays with the cake at parties, join in the eating and drinking.
- ... dine in restaurants knowing you can choose anything on the menu... and still stay on your diet.
- ... stuff the stocking at Christmas, then hit yourself.

It won't be hard for you to remember your "FREE DAYS." But to help you highlight these feast-days, you'll find in your Rotation Diet™ kit a supply of brightly colored "FREE DAY" stickers for your calendar. When you look at the month, you'll see that "FREE DAYS" far outnumber the rest.

And it saves you more than it costs! LOSE WEIGHT FEELING GREAT

The other three days a week - Monday Wednesday and Friday - you'll follow our special 3 point program

This is what makes the Rotation Diet™ *the diet you can live with.* You see on "FREE DAYS" you really live it up. You'll have a least satisfy all your cravings The next day you won't have trouble doing without your favorite foods Because you'll know you can have as much as you want of them—and anything else—in less than 24 hours And remember, every Tuesday Thursday Saturday and Sunday are Free Days! The Rotation Diet™ doesn't have fast days. The feed and fast method of dieting doesn't work. It often causes dizziness and fatigue. And when hunger pangs come most people end up eating on their fast days

The Rotation Diet™ gives you BALANCE DAYS

- On Balance Days you'll have Rotation Wafers,™ Rotation Multi Vitamins™ and a number of Rotation foods. In addition you'll have unlimited private consultation by phone with the Rotation Diet Center and your Phonefriend—a very important part of your diet.
- *Rotation Wafers™ makes the diet work.* They're critical to the success of the diet because they STOP HUNGER (yet they're not a medicine, drug or shot, so they're perfectly safe) PROVIDE ENERGY (through a unique combination of healthful high energy, natural ingredients)

ELIMINATE FATIGUE (you can do whatever you want on a Balance Day from early morning til late at night)

- *This is a personalized, custom diet,* not a "mass program" that's the same for everyone. The amount of Rotation Wafers you must take is determined by a Rotation Diet Center counselor, based on the enclosed questionnaire and then filled in by hand in your member's Instruction Handbook
- *Rotation foods make the diet even easier to live with.* Choose from a list that includes a full 16 ounces of cottage cheese, Rotation Custard in every flavor you can imagine, Rotation Jello in every color of the rainbow, and all the diet soda, coffee, tea or water you want. Additional foods will be added later by your personal counselor
- *You'll save more than you spend on this diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week. That more than covers the cost of The Rotation Diet.™ And with the Rotation Diet,™ there are no office visits or expensive consultations. You get unlimited telephone support included in your low weekly charge

Answers to your questions

Q. How much weight can I expect to lose?

A. Women usually lose four to 15 pounds a month, men 10 to 20. The amount depends on many personal variables including the total amount of weight you have to lose. (Example: We have had men and women lose over 40 lbs. in one month.) Most important: you'll be doing it the safe way without harmful drugs. And you won't be bothered by fatigue.

Q. Will The Rotation Diet™ help me maintain my weight loss?

A. Once you come near your correct weight, the Wednesday Balance Day is eliminated. And when you reach your exact goal weight you then eliminate either Monday or Friday's Balance Day. The Rotation Maintenance Program means you have six "FREE DAYS" each week and just one Balance Day.

Q. What are Rotation Wafers™ made of?

A. They contain only natural ingredients specially formulated to make The Rotation Diet™ work. The ingredients are toasted soy flour, pure honey, non fat dry milk solids and/or malted milk soy oil, cocoa and/or carob and vanilla powder. The nutritive value of each wafer is: 45 grams protein, 11 gram carbohydrate and 1 gram fat. Total calories per wafer: just 6 calories!

Q. Can I buy Rotation Wafers™ at my drug store?

A. No. They're manufactured expressly for the Rotation Diet™ Center and are available only from us.

Q. Is The Rotation Diet™ medically safe?

A. You take no drugs or medicines for The Rotation Diet.™ However, we do encourage you to discuss The Rotation Diet™ with your physician before going on this or any diet.

Q. If I stop The Rotation Diet™ for a while, can I come back on?

A. Absolutely. Your membership is a Lifetime membership with a one time only Reactivation Fee. Just give us a call toll free, and we'll resume shipping your supplies.

Here's what you get in your Rotation Diet kit:

- Rotation Wafers™ 2 or 4 week supply. You choose the starting amount on your membership application
- Rotation Multi-Vitamins™ A full 2 week or 4 week supply
- Instruction Handbook All you need to know, including the number of Rotation Wafers™ personally allotted for you, how to switch days, how to add "FREE DAYS" and much more
- Stickers for your "FREE DAYS"
- Calendar for the year. Record your weight loss, watch the numbers drop

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- Free telephone contact whenever you want, as often as you like—whether you're on the diet on a maintenance program or not receiving supplies at all
- Free subscription to the *Rotation* news letter

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In Pa. Call (215) 794-3278 Seven days 9-9
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One day service—Fast and personal

Shipping Department

Rotation Center

We know that when you decide to go on a diet you want to start **NOW!** With this in mind we are geared-up to process all new orders the **same day that they are received.** We ship UPS and usually the order is delivered the next day. How are we so efficient? Easy—we use people, not computers? My son Blair ordered a book from Time-Life and it took 6 weeks before it was delivered. He asked me every day for 6 weeks where his book was (he's 14) and I kept telling him that computers take time. He asked why they were used if they took so long and I explained that they were needed in large scale operations. The **Rotation Diet Center** is relatively small. All together we are run by 65 people (up from 20 people only 6 months ago). Don't expect Sears Roebuck. When you call us you get a person who is on the Rotation Diet and *CARES about YOU!* No answering machines—no computers—just people who care!

EXHIBIT E

THE DIET YOU CAN LIVE WITH!

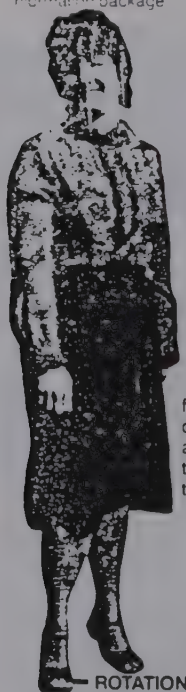
You can lose 16-20 pounds per month with The Rotation Diet without giving up your favorite foods

Four days a week eat what you like as much as you like Tuesday, Thursday Saturday and Sunday, eat and drink whatever you like good food or junk food, from pancakes to pizza to pastry

Three days a week Monday Wednesday and Friday you follow our special three-point program The weight comes off and stays off.

- No calories to count • No forbidden foods • No drugs
- No foods to weigh • No gadgets • No fatigue

To start looking the way you want call for your free no-obligation information package



CALL US TOLL FREE.

(800) 523-5763

In Penna call (215) 794-3278

Call 7 days a week from 9 AM to 9 PM

I'm Dottie Woolslager I'm thin for the first time since the kids came, and I know I'll never be fat again. I found the Rotation Diet, the only diet I've ever been able to live with

[illegible] the free information packet will be telephone numbers of people like me who are on the Rotation Diet right now, and can tell you about their experience with it OR get your free information packet by filling out the coupon below

Do It Right Now!

ROTATION DIET CENTER

NATIONAL HEADQUARTERS

FURLONG, PA 18925

Please send me your FREE NO-OBLIGATION information packet today

NAME _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

EXHIBIT F

Rotation Diet

Buckingham

Direct Response Advertising

Buckingham, PA 18912-0102 • (215) 794-5914

SCRIPT FOR BUCKINGHAM PRODUCTS
60 SECOND DIET SPOT

PLEASE GET A PENCIL AND STAND BY.

I'M GOING TO TELL YOU ABOUT AN EXCITING NEW DIET THAT IS SWEEPING THE COUNTRY. THERE ARE NOW OVER 100,000 PEOPLE ON THE ROTATION DIET---AND THESE PEOPLE ARE LOSING POUNDS WHILE EATING WHATEVER THEY WANT 4 DAYS EVERY WEEK.

THAT'S RIGHT! ON THE ROTATION DIET EVERY TUESDAY, THURSDAY, SATURDAY AND SUNDAY ARE FREE DAYS WHEN YOU ARE ENTIRELY FREE TO EAT WHATEVER YOU WANT---AND AS MUCH AS YOU WANT. THE OTHER 3 DAYS YOU OPERATE ON A PERSONALIZED DIET THAT KEEPS YOUR ENERGY HIGH AND YOUR HUNGER LOW AND YOU'RE NEVER MORE THAN TOMORROW MORNING AWAY FROM BEING ABLE TO HAVE WHATEVER YOU WANT. FOR A FREE BROCHURE CALL NOW TOLL FREE.

800-523-62-62

THAT'S

800-523-62-62

ONCE AGAIN, FOR A FREE BROCHURE CALL

800-523-62-62

SEE OUR AD IN THIS WEEK'S TV GUIDE

EXHIBIT G

Take-A-Break Tablets® help to maintain your current weight up to 15 days if you must "Take-A-Break" from your Rotation Diet.®

That's right! You can now enjoy up to 15 consecutive Free Days without regaining the weight that you have lost!

We know that there are times when it's impossible to diet – *even Rotation Diet*™

- Vacations with meals paid in advance
- Last-second business dinners
- When you're sick in the hospital
- Just a feeling that you can't argue with
- All sorts of pleasant times, emotional times, hard times – when it's just not the time to diet

NO DRUGS OR MEDICINE

Take-A-Break Tablets® are specially formulated to work with the Rotation Diet® and help to keep food from turning to fat. This means that for one day, two days, any number up to 15 days, you can enjoy taking a break from your Rotation Diet®. Soon as you return – get back on the Rotation Diet® and in one week or less you'll be back at your Pre-Break weight. It takes two balance days to rid your body of the food that was accumulated during Break Time.

Order Now...

You should have a supply of **Take-A-Break Tablets**® On Hand for those situations that develop at the last minute! Don't worry about keeping the tablets around – they have unlimited life!

COST	
Per Day	$ 1.25
15 Days	$18.75

(Includes postage and handling)

EXHIBIT H

SAT SUN TUES THUR

ROTATION CENTER

National Headquarters • Rotation Plaza • Furlong, Pennsylvania 18925

You were very wise to request information about our popular Rotation Diet...
And because you acted at this time, you can now take advantage of a very special offer, including a valuable free gift and a money back guarantee.

The ROTATION DIET is the only diet available to you that lets you eat or drink anything you want 4 days a week and still lose up to 20 lbs. a month!

No Pills. No calorie counting. No special foods. No weighing or measuring. No exercising. No boredom. No gimmicks. NO KIDDING!

Dear Friend,

If you're like me, and the thousands of people I've helped to lose weight, you've tried everything to shed all those unwanted pounds....from calorie counting and weighing foods to carbohydrate, grapefruit, water, and liquid protein diets. But the problem with diets is just that. They're diets! And as we all know, anything that demands that you alter your lifestyle is difficult to stick with. And when you quit, all those pounds and inches come right back!

The Rotation Program is the diet you can live with.

That's right—the Rotation Diet is different from all the others because 4 days a week you eat and drink anything you want, as much as you want. Not celery and carrots, but sundaes, pizza, french fries, pies, cake, anything at all. These 4 days are your "FREE DAYS" and they help satisfy your cravings so you can stay with the program and lose each and every pound you want to.

Unlike other weight loss plans, Rotation Diet lets you celebrate birthdays with cake, dine out with no restrictions, ..vacation without limitations and enjoy parties without guilt just like everybody else.

"Dieting" 3 days a week to lose weight month after month, including 16 to 20 pounds the first month. Impossible? Not at all...I've lost 62 pounds!

That's right. I've lost 62 pounds by using the Rotation Plan. Three days a week I followed a personalized weight loss program using Rotation Wafers and Vitamins. I didn't experience fatigue, dizziness, hunger or boredom. I lost the weight I wanted to without guilt and without drugs.

Plus, I've kept off that unwanted weight. That's the beauty of the Rotation Diet. They don't leave you "high and dry" after you've reached your weight loss goal like most every other diet.

OVER PLEASE

Rotation Diet gives you an easy weight maintenance plan, too!

After you reach your goal, Rotation Center will show you how easy it is to keep that weight off without anyone ever knowing and without it interfering with your lifestyle.

In addition, the Rotation Diet also allows you to vacation free of guilt with our special **TAKE-A-BREAK** plan. You can now safely put your diet on hold for up to 15 days when it just isn't convenient. That's right—Rotation's special Take-A-Break tablets let you take a break without feeling guilty and without gaining back all the weight you've lost.

The Rotation Diet can actually save you more money than it costs!

With the Rotation Diet you can save more than you spend for the diet. If you're like most people you'll cut about 40% off your food bill because you'll cut down on expensive foods during your 3 "BALANCE DAYS" each week.

Plus, there are never any expensive consultations or office visits to pay for. Our **TOLL FREE HOTLINE** also assures that you won't have any phone bills, and we guarantee you unlimited use of this special personal and confidential service.

Now's the time to act!

I hope you will take a few minutes right now to read my personal story and all the other important information in the enclosed brochure. Then call me and I'll send out the Rotation Diet for you. Or if you prefer, use the handy personalized order form that we've enclosed. Either way, don't put it off—you've got nothing to lose except a lot of unwanted pounds.

Sincerely,

Dot Woolslager

Dot Woolslager
Director
Rotation Diet Program

PS: Just for taking the first step to a new, thinner life, we want to send you a beautiful FREE GIFT valued at over $22.00. So don't put it off for one more day. Call or write to me now.

I'll be looking for your order - be sure to mark the envelope to my personal attention!

RD381(R)

EXHIBIT I

Dot Woolslager, left, less 52 lbs., and Judy Ruthrauff, minus 23 lbs., company executives at Rotation Center, and long time users of Rotation Diet and its Maintenance Plan.

Dot and Judy Introduce the "NO FRILLS" Rotation Diet...

It's the real thing—not an imitation!

Because of overwhelming product interest, we've created a low cost "No Frills" version of our unique Rotation Diet Program. **You still eat anything you want 4 days a week, and you still lose weight.** It's still the diet you can live with because you're never more than 24 hours away from eating all the foods you love.

How Is This Possible?

You can now get this very popular, successful diet at a substantially reduced cost because

- there is no membership fee
- there are no expensive movie stars advertising our diet
- there are no expensive TV or radio commercials
- there's no newsletter
- there's no fancy packaging
- there are no "free" gifts to increase the cost
- there's no free "800" phone number
- and there are no separate vitamins—you chose your own multi-vitamin

Everything else about the Rotation Diet remains the same—you sacrifice nothing when it comes to losing weight!

Compare Rotation Diet With Others You See Advertised . . .

Do these other "miracle" diets require you to count calories? Prepare special foods? Do special exercises? Take some sort of drug? Do without your favorite foods for weeks at a time? Make you spend money and waste valuable time at weight reduction sessions?

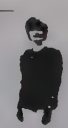
Rotation Diet doesn't make you do any of these!

Please take a few minutes right now to read the enclosed details on this "NO FRILLS" Rotation Diet Plan. You'll see that it works just like the original Plan. It's just as safe, just as effective and just as easy! Best of all, you can now try it for as little as $19.98. So go ahead—ORDER TODAY. What do you have to lose besides pounds?

Dot Woolslager Judy Ruthrauff

If you're still not convinced give us a call. We'll talk with you personally and answer any questions you have!

NF103-33



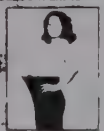
It worked for Dia Woodington. She ate cheeseburgers, ice cream sundaes, Tia Marias and all the other foods that got Jovee!

"I entered the Rotation Diet on April 23, 1979. By the end of the summer I had lost 40 pounds, dropping my weight from 185 to 145. I was beginning to rejoin the human race!

Since then I've been able to enjoy a modified maintenance plan (fewer diet days) and still lose weight. My original goal was to get down to 120 pounds, but now I think I'll be satisfied until I get to 115. I'm almost [illegible] my nutritionist—egg, skim milk, cottage cheese and I had grown [illegible]

[illegible] moved by [illegible] and family [illegible] very proud of [illegible] two extremely [illegible] nothing, [illegible] [illegible] back. (And I enjoy [illegible]

The Rotation Diet has transformed my life and I know it can do the same for you."



It worked for Judy, too.

Here I am with the slacks I used to wear before the Rotation Diet. Now I'm 23 pounds lighter.

It also worked for these happy people . . .

"I've lost over 70 pounds while eating all the ice cream that I want 4 days a week. THIS IS THE MOST SUCCESSFUL DIET EVER!"

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."

"The first week I lost 6 lbs. The second week I lost another 3 lbs. I couldn't believe how good this works and how easy it is. It takes [illegible] day at a time!"

"The diet is everything it is claimed to be. [illegible] weight loss [illegible] every minute doing it. My [illegible]

A. J. Robbins, M.D., thoracic surgeon, nutritionist, superintendent of a large hospital in NJ, and a member of the Professional Advisory Board of the Rotation Diet Center says . . .

"Experience, both personally and professionally, with the Rotation Diet has enabled me to attest to its effectiveness as well as its safety."

Phone Friends Help You Succeed

Available 7 days a week, 12 hours a day, Phone Friends will answer your questions, lend support and help you celebrate your weight losses. They also guide you through holiday aberrations and swooches.

The Rotation Diet Will Work For You, Too!

Here's how the Rotation Diet works:

FREE DAYS

Tuesday, Thursday, Saturday and Sunday are FREE DAYS. You eat and drink whatever you like—good food or junk food—as much as you want. Not just ice cream, but a sundae with fudge sauce, whipped cream, nuts . . . a cheeseburger and french fries . . . double order of onion rings . . . pretzels and beer . . . all you can eat, all you want.

For 4 days a week you're eating the way you've always eat. FREE DAYS are [illegible] reward. They are what makes the difference between your staying on the diet and giving up. Most people go on diets because they're bored with the same foods, or they're tired of [illegible] special and frequent experience. There's none of that with the Rotation Diet.

The Rotation Diet is the diet you can live with and stick with. After you reach your weight goal, you'll get more FREE DAYS each week—up to 6 out of 7.

We call the Rotation Diet the no-one-has-to-know you're on a diet diet. That's because of its special switching-day feature. It gives you all special days without messing up your diet.

It won't be difficult for you to remember your FREE DAYS. And when you look at the month you'll see that FREE DAYS [illegible] numbers the others.

S	M	T	W	T	F	S
Free Day	Diet Day	Free Day	Diet Day	Free Day	Diet Day	Free Day
[illegible]						

DIET DAYS

Monday, Wednesday and Friday are DIET DAYS. On these days [illegible] special program which includes Rotation Chewable Tablets. We've created a simple, quick-to-prepare [illegible] Rotation Chewable Tablets make the diet work. They [illegible] because they STOP HUNGER with [illegible] PROVIDE ENERGY with [illegible] ESSENTIAL [illegible] [illegible] Diet Day [illegible]

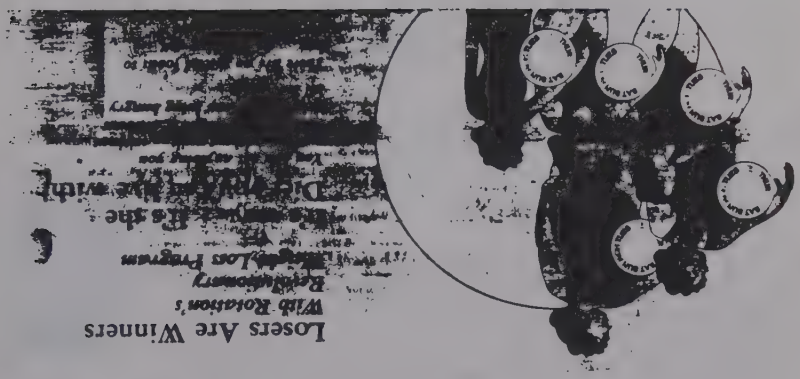
With the Rotation Diet [illegible] Beverages and [illegible] DIET DAYS each week. You [illegible] FREE DAYS after [illegible] and [illegible] Free Days [illegible] Area. You [illegible]

MAINTENANCE

Once [illegible] weight goal [illegible] Then [illegible] Each [illegible] Area. You [illegible]

TAKE-A-BREAK

The Rotation Diet allows you to [illegible] Take-A-Break tablets. You can now safely [illegible] to 5 days when it's not convenient. You [illegible] don't gain back all the weight you've lost.



Rotation Center's Advisory Board Director Answers Your Questions...

Dr. Barry Bricklin is Director of Rotation Center's Professional Advisory Board. His responsibilities are to evaluate the plan and develop recomendations.

About 13 years ago Dr. Bricklin weighed over 220 pounds. He's 5'8" tall. He lost 75 pounds with an earlier version of the Rotation Diet and has maintained his desired weight of 145 pounds for 12 years with the current plan.

Currently Dr. Bricklin is an associate professor of psychology at Hahnemann Medical College in Philadelphia. Previously he's served Jefferson Medical Hospital, Walter Reed Army Hospital, E.I. DuPont Company, New York Academy of Medicine and the Columbia Broadcasting System (CBS).

Q: Does the Rotation Diet really work? Do people lose weight on it?

A: It works extremely well. But as any doctor with years of experience at [illegible] realizes, designing a way to lose weight is only a small part of the challenge. My years of observation of this diet's impact on [illegible] breakthrough is the unique way it allows a person to find their [illegible] weight and then stay there.

Q: Is the Rotation Diet medically safe?

A: You take no drugs or medications with this diet. However we encourage you to follow the Rotation Diet with your doctor's approval [illegible] this or any diet.

Q: What are Rotation Chewable Tablets?

A: They are [illegible] ingredients specially formulated to assist you in the diet's success. The [illegible] Chewable Tablets [illegible] aromatic taste. They are [illegible] Rotation Chewable Tablets.

Q: How much weight can I lose?

A: Women usually lose 1 to 2 pounds a week with [illegible] pounds. The amount depends on many personal variables including the total amount of weight you have to lose.

Q: Can I buy Rotation Chewable Tablets at my drug store?

A: No. They are specially formulated [illegible] Rotation Diet Center and are available only [illegible] expressly for the Rotation Diet Center and are available only [illegible]

Prompt Confidential Service

Orders are processed the day they are received! We know that when you decide to go on a diet you want to start NOW. With this in mind, we are geared to process all new orders the same day they are received. We ship by [illegible] which means that usually you receive your materials in 4 to 7 days.

We invite you to visit us if you pass our way. We'd love to meet you in person and hear about your success with the Rotation Diet. Come see us soon...

National Headquarters • Rotation Plaza • Furlong, Pennsylvania 18925 • 215-794-8293 • 215-794-8881 • 7 days a week • 9:00 a.m.-9:00 p.m. EST

Why wait any longer? ORDER TODAY! Get the diet you can truly live with!

It's Easy To Get The Diet You Can Live With . . .
Here's How:

Complete this brief order form.
Don't forget to fill in the credit card information and sign if you are charging your order.
Mail your order form along with your payment if paying by check or money order in the handy postage paid envelope enclosed.

CREDIT CARD USERS
Get extra fast service by phoning in your order. Call (215) 794-3293 or (215) 794-8881 7 days a week 9:00 a.m. - 9:00 p.m. EST

ADDITIONAL ORDER BLANKS ON REVERSE FOR YOUR FRIENDS

DON'T WAIT... ACT TODAY
TO GET THE DIET YOU CAN LIVE WITH!
(orders processed within 24 hours)

The Real Rotation Diet
"NO FRILLS" Plan

National Headquarters • Rotation Plaza • Furlong, Pennsylvania 18925

☐ YES! I want to begin the NO FRILLS Rotation Diet Plan right away. Please send the following:
☐ NO FRILLS Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling . . . TOTAL $23.93
☐ NO FRILLS Rotation Diet—4 Week Supply $39.95 Rotation Center pays postage & handling . . . TOTAL $39.95

OM7021000

Andrea Sacks
2727 29th St Nw Apt 311
Washington,, DC 20008

PLEASE CHANGE ANY INCORRECT INFORMATION. USE STREET & APARTMENT ADDRESS — UPS CANNOT DELIVER TO P.O. BOXES

Please Check One: (no C.O.D.)

☐ Money Order ☐ Check Payable to: ROTATION DIET
OR
☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club

Card # _____

Expiration Date _____

Signature _____

Date _____ Phone # ( ) _____

Tell a friend about the "NO FRILLS" Rotation Diet Plan . . .

If you have friends or relatives who would also like to get the diet they can live with, just have them use the forms below. Then mail all orders with appropriate payment in the enclosed postage paid reply envelope.

NAME _____
ADDRESS _____ APT _____
CITY _____ STATE _____ ZIP _____
(No P.O. boxes, please — UPS cannot deliver.)

☐ YES! I want to begin the NO FRILLS Rotation Diet Plan right away. Please send the following:
☐ NO FRILLS Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling . . . TOTAL $23.93
☐ NO FRILLS Rotation Diet—4 Week Supply $39.95 Rotation Center pays postage & handling . . . TOTAL $39.95

PLEASE CHECK ONE (no C.O.D.) ☐ Money Order ☐ Check Payable to ROTATION DIET
OR ☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club
Card # _____ Expiration Date _____
Signature _____ Date _____ Phone # _____

NAME _____
ADDRESS _____ APT _____
CITY _____ STATE _____ ZIP _____
(No P.O. boxes, please — UPS cannot deliver.)

☐ YES! I want to begin the NO FRILLS Rotation Diet Plan right away. Please send the following:
☐ NO FRILLS Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling . . . TOTAL $23.93
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PLEASE CHECK ONE (no C.O.D.) ☐ Money Order ☐ Check Payable to ROTATION DIET
OR ☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club
Card # _____ Expiration Date _____
Signature _____ Date _____ Phone # ( ) _____

NF103-02

EXHIBIT J

The Rotation Diet Can Actually Save You Money Than It Costs!

That's right! With the Rotation Diet you'll save e than you spend on this diet. If you're like st people you'll cut about 40% off your food bill ause you'll cut down on expensive foods during r 3 Balance Days each week. And that will e than cover the cost for the Rotation Diet. Plus there are never any expensive office visits consultations. Our TOLL FREE HOTLINE also assures that you won't even have any phone bills because we guarantee you unlimited use of this service. It's included in your low weekly cost.

So what do you have to lose besides a lot of pounds? Call us today or use the easy order blank on page 13 to start your Rotation Diet. Remember losers are winners with Rotation Diet!

"Everyone has one problem or another during weight loss, but on this diet, you get the answers and all the help you need."
C.T., Toronto, Canada

"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY AND SUNDAY!"
M.A., Norristown, PA

ose Weight, Feel Great and Improve Your Health... he Rotation Plan is truly a diet you can live with!

eat anything you want and as much as you want 4 da[illegible] week — no limitations, no guilt

diet only 3 days each week

no special foods to buy

no drugs, no medicines — just natural ingredients

no weighing out portions, no counting calories

- enjoy better health and longer life
- experience weight loss without dizziness or fatigue
- save up to 40% on your current food bills
- reach your goal then keep it off with the Rotation Diet Maintenance Plan
- enjoy unlimited help and support from your Rotation Center Phonefriends

This is a **personalized** diet. It isn't the same for everybody. A special Rotation Center Diet Counselor will analyze your needs and set up your diet accordingly.

And remember with the Rotation Diet you are never more than 24 hours away from the best meal of your life!

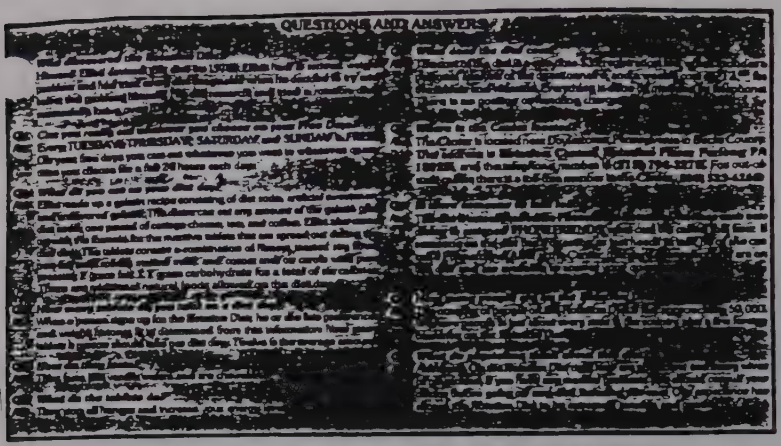
FOR EASY ORDERING CALL TOLL FREE 800-523-5763

Your new Phonefriends are waiting to help you in any way they can.

"I've lost over 70 pounds while eating all the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!"
P.A., Philadelphia, PA

"I've been on maintenance for 8 months and it's working great! I now have only ONE diet day each week."
E.B., Los Angeles, CA

5



CALL FOR MORE INFORMATION

TOLL FREE (800) 523-6262
In Penna. (215) 794-3278

Seven days a week from 9 A.M. to 11 P.M. (Eastern time)
there is a Phonefriend ready to answer your questions or take your order.
Why not call now!

**A FRIEND CAN USE THE COUPON BELOW
TO ORDER AN INFORMATION PACKET LIKE THE ONE YOU RECEIVED**

Yes, I'm interested in finding out more about a diet that lets me eat whatever I want every TUESDAY, THURSDAY, SATURDAY and SUNDAY. Please send me the Rotation Diet Information Packet. I understand that the Packet is FREE and that there is absolutely no obligation!

Name_____

Street address_____ Apt. _____

City_____ State_____ Zip _____

Telephone (optional) __(__)_____
area code

Please fill out this FREE request form and mail it in an envelope to:
ROTATION DIET CENTER
Furlong, PA 18925
or call:
Toll Free (800) 523-6262
In Penna. (215) 794-3278

ROTATION REP NUMBER

EXHIBIT K

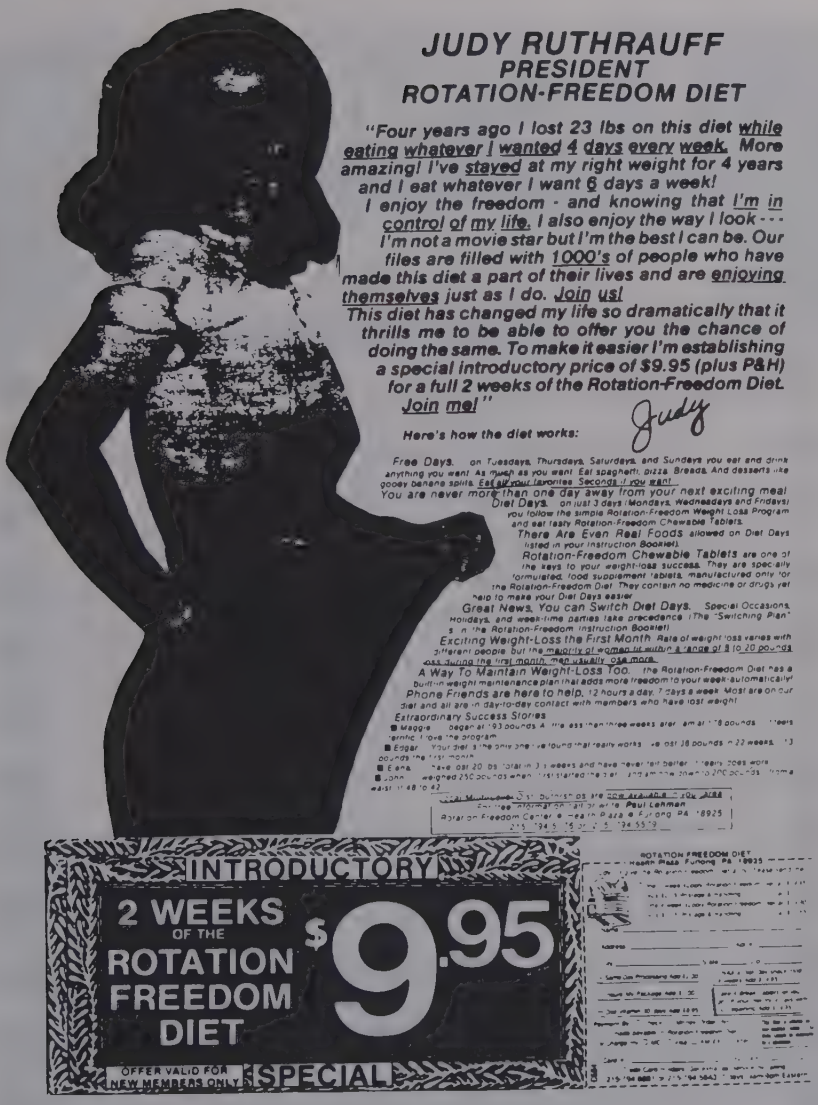

JUDY RUTHRAUFF
PRESIDENT
ROTATION-FREEDOM DIET
"Four years ago I lost 23 lbs on this diet while eating whatever I wanted 4 days every week. More amazing! I've stayed at my right weight for 4 years and I eat whatever I want 6 days a week!
I enjoy the freedom - and knowing that I'm in control of my life. I also enjoy the way I look - - - I'm not a movie star but I'm the best I can be. Our files are filled with 1000's of people who have made this diet a part of their lives and are enjoying themselves just as I do. Join us!
This diet has changed my life so dramatically that it thrills me to be able to offer you the chance of doing the same. To make it easier I'm establishing a special introductory price of $9.95 (plus P&H) for a full 2 weeks of the Rotation-Freedom Diet.
Join me!"
Judy
Here's how the diet works:
Free Days. on Tuesdays, Thursdays, Saturdays, and Sundays you eat and drink anything you want. As much as you want. Eat spaghetti, pizza, Breads, And desserts like gooey banana splits. Eat all your favorites. Seconds if you want.
You are never more than one day away from your next exciting meal.
Diet Days. on just 3 days (Mondays, Wednesdays and Fridays) you follow the simple Rotation-Freedom Weight Loss Program and eat tasty Rotation-Freedom Chewable Tablets.
There Are Even Real Foods allowed on Diet Days (listed in your Instruction Booklet).
Rotation-Freedom Chewable Tablets are one of the keys to your weight-loss success. They are specially formulated food supplement tablets, manufactured only for the Rotation-Freedom Diet. They contain no medicine or drugs yet help to make your Diet Days easier.
Great News. You can Switch Diet Days. Special Occasions, Holidays, and weekend parties take precedence. (The "Switching Plan" is in the Rotation-Freedom Instruction Booklet)
Exciting Weight-Loss the First Month. Rate of weight loss varies with different people but the majority of women lose within a range of 8 to 20 pounds and during the first month, men usually one more.
A Way To Maintain Weight-Loss Too. the Rotation-Freedom Diet has a built-in weight maintenance plan that adds more freedom to your week automatically!
Phone Friends are here to help. 12 hours a day, 7 days a week. Most are on our Diet and all are in day-to-day contact with members who have lost weight.
Extraordinary Success Stories
Maggie began at 193 pounds. After assignment three weeks later, am at 178 pounds. Years gaining, I love the program.
Edgar. Your diet is the only one we found that really works. Lost 38 pounds in 22 weeks. 13 pounds the first month.
Esme have lost 20 lbs. total in 3½ weeks and have never felt better. Every body does work.
John weighed 250 pounds when I started the diet. Am now down to 200 pounds. Home again in 48 to 42.
Paul Lehman
Rotation Freedom Center
Royal on Freedom Center
INTRODUCTORY
2 WEEKS OF THE ROTATION FREEDOM DIET
$9.95
OFFER VALID FOR NEW MEMBERS ONLY
SPECIAL
ROTATION FREEDOM DIET

EXHIBIT L

DIET GRAM

FREE GIFTS PLUS SPECIAL PRICE
. . . BUT YOU MUST ACT NOW!

Rotation-Freedom . . . the diet people

ANNOUNCE

the breakthrough diet of the future!

FREEDOM *Plus*!

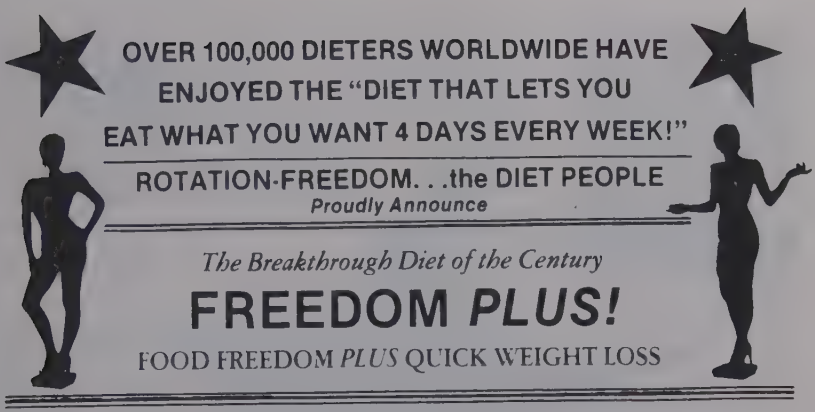
Food Freedom plus Quick Weight Loss

Just like Rotation-Freedom, you will enjoy 4 ABSOLUTELY FREE EATING DAYS every week BUT NOW LOSE UP TO 3 TIMES AS FAST!! Every Tuesday, Thursday, Saturday, and Sunday enjoy your ice cream, French Fries, cake and cookies — whatever you want, and as much as you want WHILE YOU LOSE 10, 20, 40, 60, or more POUNDS FAST!

All FREEDOM *Plus*! dieters are automatically eligible for $500 weight loss prizes! You will receive complete information with your supplies.

Monday, Wednesday, and Friday you'll enjoy the all-natural FREEDOM *Plus*! Chewable Tablets and eat real foods as outlined in your instructions. It's pretty easy getting through the Diet Day when you know that tomorrow you can eat whatever you want!

We've added Q-L 2001 to the Free Day. Q-L 2001 can be used as a delicious soup or as a dip with crackers or vegetables. ITS SPECIAL ALL-NATURAL INGREDIENTS HELP THE FREE DAY FOOD MOVE RIGHT OUT OF YOUR BODY. Within 3 days you'll see the change IN YOUR CLOTHES AND ON YOUR SCALE as this dramatic new weight loss plan DOES ITS JOB!


OVER 100,000 DIETERS WORLDWIDE HAVE
ENJOYED THE "DIET THAT LETS YOU
EAT WHAT YOU WANT 4 DAYS EVERY WEEK!"
ROTATION-FREEDOM. . .the DIET PEOPLE
Proudly Announce
The Breakthrough Diet of the Century
FREEDOM PLUS!
FOOD FREEDOM PLUS QUICK WEIGHT LOSS

Here's How The FREEDOM *PLUS* DIET Works:

Free Days, . . it really is fabulous because on Tuesdays, Thursdays, Saturdays and Sundays you eat and drink anything you want. As much as you want. And still lose weight. It's truly a diet you can live with.

Eat Anything You Want, . . eat spaghetti, ravioli, pizza. Breads; potatoes. And desserts: chocolate mousse, and fudge cake. Gooey banana splits. Pecan pie (with ice cream if you want). Eat all your favorites. Seconds if you want.

It's Fantastic, . . imagine: eat anything you want 4 days every week and still lose weight. Tuesdays, Thursdays, Saturdays and Sundays are your Free Days.

YOU ARE NEVER MORE THAN ONE DAY
AWAY FROM YOUR NEXT EXCITING MEAL.
QL 2001!

On your Free Days you will sip 3 cups of QL-2001: a delicious soup that comes in chicken, onion and beef flavors. The special all-natural fiber in the soup helps to move the free day food right out of your body!

Diet Days, . . on just 3 days (Mondays, Wednesdays and Fridays) you follow the simple Freedom *Plus* Weight Loss Program. On Diet Days, you eat tasty Freedom *Plus* Chewable Tablets along with as much water, tea, coffee or diet soda that you want.

There Are Even Real Foods allowed on Diet Days (listed in your Instruction Booklet). The Freedom *Plus* Chewable Tablets are one of the keys to your weight-loss success. They are specially formulated, food supplement tablets, manufactured only for the Freedom *Plus* Center. They contain no medicine or drugs yet help to make your Diet Days easier. They are only available for members of this weight-loss plan.

Great News, . . *You Can Switch Diet Days*. Wow, that is great news. . . Special Occasions, Holidays, and weektime parties take precedence. Your friends won't even know you're on a diet. (The "Switching Plan" is in the Freedom *Plus* Instruction Booklet).

A Way To Maintain Weight Loss Too, . . the Freedom *Plus* Diet has a built-in weight maintenance plan. Once you have reached your goal you reduce your Diet Days to "2," then as your system adjusts to your new weight your Diet Day Number is "1". You can then adjust any weight changes by adding and subtracting diet days as you need them. In other words, if you stick to the plan you should be able to stay at the weight you want for the rest of your life. Isn't that incredible!

Exciting Weight Loss the First Month. Rate of weight loss varies with different people, but the majority of women usually fit within a range of 8 to 20 pounds loss during the first month, men usually lose more.

S	M	T	W	T	F	S
Free Days	Diet Days	Free Days	Diet Days	Free Days	Diet Days	Free Days
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

DOT and JUDY
Answer Your Questions

Q. What about vacations, parties and other times when I will be forced to eat what is served?

Q. Should I consult my doctor before starting the FREEDOM PLUS Diet Plan?

Here's what dieters were telling us before QL-2001
Imagine what they'll be saying NOW!!!

I'm very, very happy. For the first time in my life I can be included in the 'before after' file of a diet plan. I have sent you three more members.

She heard about the diet's success stories while working in our shipping department and decided to try it. Janet needed a diet that let her eat anything she wanted while attending Dog Shows. Dieting on Mondays, Wednesdays and Fridays was perfect for her.

"I've lost 39 lbs. Your diet was fantastic. I have been on your maintenance program for over a year now and I am holding my weight right where I want it."

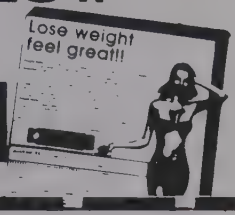
Full copies of the testimonial letters above are available from the Center. Weight loss is a personal matter and, therefore, it should not be concluded that the testimonials above, although exact quotes, are typical of the weight loss that any specific individual should expect.

Read What Other Happy Dieters Say

- "[illegible] began at 193 lbs. A little less than three weeks later I am at 178 lbs. It feels terrific. I love the program."
- "[illegible] your diet is the only one I've found that really works. I've lost 36 lbs. in 22 weeks. (13 lbs. the first month.)"
- "[illegible] (She stopped smoking). I went from 112 to 138 lbs. I'm now down to 118 and feel great. I would recommend the diet to anyone."
- "Essie Mae: This is one diet you can really live with and enjoy yourself while on it." (Dress size down from 18 to 14.)
- "John: I weighed 250 pounds when I first started the diet... and am now down to 200 pounds...from a waist size of 48 to 42."
- "Bernie: ...a loss of 61 pounds in 4 months. My waist dropped from 39", to 32", inches."

AND IT CAN WORK FOR YOU TOO!

FREE $14.95 WEIGHT-MATE PLUS LOWER PRICES IF YOU ORDER NOW!



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I'm ready for Diet Freedom with the FREEDOM *Plus* Diet! Please send me:

☐ One 2 week FREEDOM *Plus* Diet Kit including FREEDOM *Plus* Chewable Tablets, QL 2001, complete instructions, information on the free weight loss contest, and Diet Tips.
~~$19.95~~ plus $2.00 postage & handling. TOTAL ~~$21.95~~ $16.95 SAVE!

☐ One 4 week FREEDOM *Plus* Diet Kit including FREEDOM *Plus* Chewable Tablets, QL 2001, complete instructions, information on the free weight loss contest, and Diet Tips.
~~$39.90~~ (we pay postage & handling). TOTAL ~~$39.90~~ $29.90 SAVE!

LOSE FASTER! Substitute one of our wonderful milkshakes for any meal on your Free Day. Contains the vitamins, minerals, and fiber that you need! We'll send Vanilla, Chocolate and Strawberry! SAVE!

☐ 8 Shakes — Add ~~$7.95~~ (2 Week Plan)

☐ 16 Shakes — Add $14.95 (4 Week Plan)

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Name _____

Address _____ Apt. ____

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(No P.O. Boxes please. UPS cannot deliver.)

Please check one:
check money order (no C.O.D.'s)
made payable to: FREEDOM *Plus!*
VISA MasterCard AE Diners Club

Card # _____ Exp. Date _____

Signature _____

Phone # ( ) _____

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7 days a week

FREEDOM *Plus!* ROTATION-FREEDOM CENTER, HEALTH PLAZA, FURLONG, PA 18925

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Dr. Barry Bricklin is an individual whose address is 470 General Washington Road, Wayne, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

It is ordered, That expert respondent Dr. Barry Bricklin, individually and through any corporate entity over which he now or hereafter exercises control, and his corporate successors and assigns, in connection with the endorsing, advertising, offering for sale, sale, or distribution of any weight reduction or weight control product, program or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from:

(A) Representing in advertising, directly or by implication, that any consumer can eat any quantity of food and still lose weight or main-

tain that weight loss, without an accompanying and proximate, clear and prominent disclosure that the consumer's weight loss or ability to maintain that weight loss depends on a reduction in caloric intake in the short term and an overall reduction in caloric intake over the long term.

(B) Representing in advertising, directly or by implication, the usual or average weight loss, or range of weight loss, obtained or obtainable from any such weight reduction or weight control product, program or service, unless at the time of making such representation expert respondent Dr. Barry Bricklin possesses and relies upon competent and reliable survey or other scientific evidence that substantiates the representation.

(C) Making any representation in advertising, directly or by implication, regarding the efficacy or performance of any weight reduction or weight control product, program or service, the content or mode of action of any weight reduction or weight control product, program or service, unless at the time of making such representation expert respondent Dr. Barry Bricklin possesses and relies upon competent and reliable survey or other scientific evidence that substantiates the representation.

For purposes of Part I of this order, *competent and reliable* evidence shall mean an actual exercise of expert respondent Dr. Barry Bricklin's expertise in evaluating weight reduction and/or weight control programs and products with respect to which he is expert, in the form of an examination or testing of the programs and products at least as extensive as someone with a similar degree of expertise would normally conduct in order to support the conclusions presented in the representation.

II

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, expert respondent Dr. Barry Bricklin shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials that were relied upon to substantiate any such representation.

2. All test reports, studies, surveys, or other materials in his possession or control that contradict, qualify, or call into question such representation.

III

It is further ordered, That expert respondent Dr. Barry Bricklin shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of 10 years from the date of service of this order, expert respondent Dr. Barry Bricklin shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the advertising, endorsing, promotion, offering for sale, sale, or distribution of any weight reduction or weight control product, program, or service, and of his affiliation with a new business or employment in which his own duties and responsibilities involve the advertising, endorsing, promotion, offering for sale, sale, or distribution of any weight reduction or weight control product, program or service, with each such notice to include expert respondent Dr. Barry Bricklin's new business address and a statement of the nature of the business or employment in which expert respondent Dr. Barry Bricklin is newly engaged as well as a description of expert respondent Bricklin's duties and responsibilities in connection with the business or employment.

IV

It is further ordered, That expert respondent Dr. Barry Bricklin, and his corporate successors or assigns, shall, within sixty (60) days after service of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

Commissioners Bailey and Azcuenaga were recorded as voting in the negative with the notation that, not having reason to believe that Dr. Bricklin should have been charged with violations of Sections 5 and 12 of the Federal Trade Commission Act, they dissented from the decision to accept an agreement that placed him under an order to cease and desist.

IN THE MATTER OF

JOHN TREADWELL
d/b/a TRANS-CONTINENTAL INDUSTRIES

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3165. Complaint, Sept. 23, 1985—Decision, Sept. 23, 1985

This consent order requires John Treadwell, doing business as Trans-Continental Industries, to cease, among other things, making any performance claims for any gasoline additive without competent and reliable evidence; claiming that tests support any performance claims without proper substantiation; and misrepresenting the results or conclusions of any tests pertaining to gasoline additives or the potential profits or marketing assistance that will be provided for distributors of respondent's products. Further, respondent is required to maintain records of substantiation for three years; file a compliance report with the Commission within 60 days; and notify the Commission of the discontinuance of his present employment and any future employment in similar areas for five years.

Appearances

For the Commission: *Paul R. Roark.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John Treadwell, an individual doing business as Trans-Continental Industries, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent John Treadwell is an individual doing business as Trans-Continental Industries ("TCI"), a sole proprietorship with its office and principal place of business located at 2489 Burlingham Place, Simi Valley, California.

PAR. 2. Respondent is now, and at all times relevant to this complaint has been, engaged in the manufacturing, offering for sale, sale, and distribution to the public of a product known as 20% PLUS ORGANIC FUEL CATALYST ("20% Plus") and other gasoline and

fuel additives. Respondent, in connection with his offering these products for sale, has also published and disseminated, and now publishes and disseminates, advertisements and other sales promotional material for the purpose of promoting their sale. 20% Plus is a gasoline additive advertised to be a means of substantially improving fuel economy in automobiles and other motor vehicles.

PAR. 3. In the course and conduct of his said business, respondent has disseminated and caused the dissemination of certain advertisements for 20% Plus and other gasoline and fuel additives by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the sending of promotional materials through the mail and the direct solicitation of individuals by telephone calls from California to numerous other states, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of these products in or affecting commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated by respondent are those identified as Exhibits A and B, which are attached hereto.

PAR. 5. In the advertisements and sales promotional materials referred to in Paragraph Four and other advertisements and sales promotional materials, and in statements made orally to prospective purchasers by telephone, respondent has stated that:

a. 1. "20%
PLUS
ORGANIC FUEL CATALYST

. . . .

—PROVEN IN TESTING TO—
Deliver marked improvement of fuel efficiency and mileage.

. . . .

LABORATORY AND FIELD TESTING
BOOKLET" (Exhibit A)

2. "20% PLUS organic fuel catalyst has been designed to improve combustion of normally unused and unburned fuel. In carefully controlled tests it has proven to aid fuel efficiency and reduce fuel consumption. It has effectively reduced fuel costs 20 to 25% in cases tested." (Exhibit B)

b. "To give you an idea of the money to be made as a distributor. . . . Back in January, 1982, . . . we had 46 distributors. 42 of those distributors made in excess of $6200.00 net, ... In fact, (*name*), this is the only business that I know of that you can literally double your money in 60 days or less."

c. Trans-Continental Industries will assist distributors of 20% Plus and other TCI products in reselling those products by placing advertising in local and national print and broadcast media and by soliciting accounts by telephone and referring those accounts to the local distributors.

PAR. 6. By and through the use of these and other statements, respondent has represented, directly or by implication, that:

a. Laboratory and road tests prove that 20% Plus reduces motor vehicle fuel costs 20 to 25%.

b. Forty-two out of forty-six distributors made in excess of $6200 profit in January 1982 by reselling 20% Plus, and distributorships are, in general, very profitable.

c. Respondent would assist distributors of 20% Plus in reselling it.

PAR. 7. In truth and in fact, contrary to respondent's representations set forth in Paragraph Six:

a. Laboratory and road test results do not prove that 20% Plus reduces motor vehicle fuel costs 20 to 25%. Laboratory test reports used by respondent in promoting 20% Plus were, in fact, altered test reports relating to tests conducted for another company and for different purposes. Such reports were used without authorization from either the testing company or the company for which the tests were conducted, and such reports do not prove or in any way substantiate the fuel cost reduction claims made by respondent.

b. Forty-two out of forty-six distributors did not make in excess of $6200 in January 1982. Most distributors have made little or no profit from the resale of respondent's products.

c. Respondent has not assisted distributors of 20% Plus in reselling it. Respondent has not placed advertisements in the media and does not conduct telephone solicitations for the benefit of its distributors.

Therefore, said advertisements and other sales promotional materials disseminated by respondent and oral statements made by respondent were and are false and misleading.

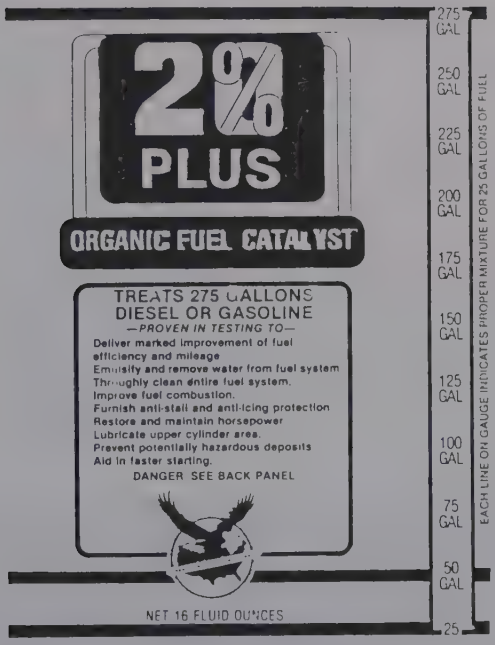
PAR. 8. By disseminating Exhibits A and B and other advertisements and sales promotional materials, respondent has represented, directly or by implication, that respondent possessed and relied upon a reasonable basis for making, at the time they were made, the representations alleged in part a. of Paragraph Six. In truth and in fact, respondent had no reasonable basis for such representations. Therefore, said advertisements and other sales promotional materials disseminated by respondent are false and misleading.

PAR. 9. The use by respondent of the aforesaid false and misleading representations has had and now has the capacity and tendency to mislead members of the consuming public into the erroneous and

mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondent by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A



LABORATORY AND FIELD TESTING BOOKLET

EXHIBIT B

SAVE 20%
of your fuel
cost or more
on earth moving
equipment, trucks,
and all combustion
engines...
DIESEL &
GASOLINE
Proven Test Results...
20% PLUS™ Organic Fuel Catalyst
NEW SCIENTIFIC
DEVELOPMENT
20% PLUS™ organic fuel catalyst is blended with a multipurpose detergent cleaning additive for all grades of diesel fuel, leaded and unleaded gasoline. which GUARANTEES a definite improvement of fuel efficiency, fuel mileage and increased engine life
20% PLUS™ organic fuel catalyst has been designed to improve combustion of normally unused and unburned fuel. In carefully controlled tests it has proven to aid fuel efficiency and reduce fuel consumption. It has effectively reduced fuel costs 20 to 25% in cases tested.
Guaranteed...
• to give definite improvement of fuel efficiency and mileage
• to remove water and moisture from fuel systems
• to clean entire fuel system
• to improve combustion of fuel
• to give anti-stall and anti-icing protection
• to restore and maintain horsepower
• to lubricate upper cylinder area
• to prevent harmful deposits
• to aid faster starting
(SATISFACTION GUARANTEED)
TRANS-CONTINENTAL IND.
4359 Tr[illegible]ship Avenue Simi Valley, California 93063
For[illegible] (805) 581 0477

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent John Treadwell is an individual doing business as Trans-Continental Industries, a sole proprietorship, with its office and principal place of business located at 2489 Burlingham Place, Simi Valley, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

It is ordered, That respondent John Treadwell, an individual doing business as Trans-Continental Industries or under any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the man-

ufacturing, advertising, labeling, offering for sale, sale or distribution of the gasoline additive known as 20% PLUS ORGANIC FUEL CATALYST ("20% Plus") or any other gasoline, oil, or fuel-saving product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. Representing, directly or by implication, that any such product will or may result in fuel economy improvement when used in an automobile, truck, recreational vehicle or other motor vehicle unless, at the time of making such representation, respondent possesses and relies upon written results of competent and reliable testing that isolates the effects of the product and substantiates the representation. Respondent may use such tests as the then current urban dynamometer driving schedule (40 CFR 86, Appendix I) or the then current highway fuel economy driving schedule (40 CFR 600, Appendix I) established by the Environmental Protection Agency or other tests of an equivalent competency and reliability;

b. Representing, directly or by implication, that any performance claim about any such product is based upon any competent and reliable test(s) or survey(s), unless such representation is true;

c. Misrepresenting, directly or by implication, the purpose, content, or conclusion of any test or survey pertaining to any such product;

d. Misrepresenting, directly or by implication, the past, present or future sales, profits or earnings available from the resale of respondent's products, or misrepresenting, directly or by implication, the past or present sales, profits or earnings of respondent's sales agents;

e. Misrepresenting, directly or by implication, the advertising or promotional efforts to be undertaken by respondent to assist distributors in the resale of respondent's products.

For the purposes of Part I, a competent and reliable test means one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that ensure accurate and reliable results.

II

It is further ordered, That respondent, his successors and assigns, in connection with the manufacturing, advertising, labeling, offering for sale, sale or distribution of any gasoline, oil, or fuel-saving product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall for at least three years after the last date of dissemination by respondent either directly or through any business entity of any representation about any such product maintain and upon request make available to the Federal Trade Commission

for inspection and copying, copies of, and dissemination schedules for, all advertisements, labels, sales promotional materials and post-purchase materials for such product and copies of all test materials and results upon which such representation is based.

III

It is further ordered, That respondent forthwith distribute a copy of this order to all present or future personnel, agents or representatives of respondent having sales, advertising, or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order and maintain that statement in its files for at least three years.

IV

It is further ordered, That respondent shall promptly notify the Commission of the discontinuance of his present business or employment and that for a period of five (5) years from the date of service of this order respondent shall promptly notify the Commission of each affiliation with a new business or employment in telephone sales, or in connection with the manufacturing, advertising, labeling, offering for sale, sale or distribution of any gasoline additive or any other gasoline, oil, or fuel-saving product, each such notice to include the new business address of respondent and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the new business or employment.

V

It is further ordered, That respondent shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

WEYERHAEUSER COMPANY, ET AL.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9150. Complaint, Feb. 9, 1981—Dismissal Order, Sept. 26, 1985

The Federal Trade Commission has dismissed a complaint that charged Weyerhaeuser Co.'s acquisition of a corrugating-medium mill from Menasha Corp. could substantially lessen competition in the manufacture of corrugating medium in the western U.S. The Commission based its dismissal on its findings that a number of market characteristics show that the acquisition did not lessen competition.

Appearances

For the Commission: *Dennis F. Johnson, Richard A. Wolff, Richard L. Sippel* and *Timothy A. Ngau.*

For the respondents: *Tefft W. Smith, James D. Sonda* and *George A. Joseph, Kirkland & Ellis,* Chicago, Ill. and *Thomas D. Yannucci, Michael E. Baumann* and *James D. Senger, Kirkland & Ellis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition of Menasha Corporation ("Menasha") that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and that said undertaking therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Corrugating medium* is unbleached paperboard used for the fluted middle layer of corrugated sheets and includes both medium pro-

duced by a semichemical process and medium produced by other processes, regardless of whether the medium contains virgin woodpulp.

(b) The *West Coast market* is the eleven-state region West of the Rocky Mountains (the *West Coast region*). The states in the West Coast region are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. [2]

II. WEYERHAEUSER COMPANY

2. Respondent Weyerhaeuser Company ("Weyerhaeuser") is a Washington corporation with its principal offices in Tacoma, Washington. It is a major integrated forest products firm engaged in the growing and harvesting of timber and in the manufacture, distribution and sale of forest products. In 1979, it had sales of $4.423 billion, end-of-year assets of $4.959 billion, contribution to earnings of $956 million and net earnings of $512 million. It has three principal forest product business segments: (1) building materials, including lumber, softwood and hardwood plywood and veneer, particleboard, hardboard, logs, chips and timber; (2) pulp, newsprint, paper and paper products; and (3) container and packaging products, including shipping containers and cartons. Weyerhaeuser is the largest producer of corrugated containers in the United States. Respondent Weybuy, Inc. ("Weybuy"), a Wisconsin corporation, is a wholly-owned subsidiary of Weyerhaeuser with its principal offices in Tacoma, Washington.

3. At all times relevant hereto, Weyerhaeuser and Weybuy have engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Weyerhaeuser transacts business in this judicial district.

III. MENASHA CORPORATION

4. Menasha Corporation is a privately-owned Wisconsin corporation with its principal offices at Highway 41, Neenah, Wisconsin. A major segment of its business is the manufacture of corrugating medium and corrugated containers. It manufactures corrugating medium for its own corrugated container plants and is a net supplier of corrugating medium to other container manufacturers. Menasha's other paper businesses include the production of solid fiber containers, paper cores and specialty packaging materials. It produces wood flour, manufactures papermaking and converting equipment and buys and sells wastepaper. Another segment of its business is the production of various plastic products, including plastic material handling containers. Menasha also owns and manages timberlands in the Pacific Northwest and owns citrus grove acreage in California. In

1979, Menasha had total sales of $239 million, net income of $11 million and end-of-year assets of $142.6 million.

5. At all times relevant hereto, Menasha engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [3]

IV. THE ACQUISITION

6. Weyerhaeuser proposes to acquire, for $66.3 million, the following assets and businesses of Menasha: (1) a corrugating medium mill in North Bend, Oregon; (2) a corrugated container plant in Anaheim, California; (3) three waste paper plants, two in Portland and one in Eugene, Oregon, and one sales office in Portland, Oregon; (4) a 710-acre unimproved mill site in North Bend, Oregon; and (5) current assets having an adjusted net book value of $8.3 million. These assets comprise almost all of Menasha's operations in the western part of the United States.

7. Menasha's non-West Coast assets and liabilities have been transferred, through a pre-acquisition reorganization, to New Menasha, Inc., a new Wisconsin corporation established to carry on Menasha's non-West Coast businesses. New Menasha therefore operates substantial businesses in the eastern half of the United States.

8. Menasha has sought to restructure a tax-free pre-acquisition reorganization and has sought a ruling from the Internal Revenue Service that the acquisition will be tax-free. Consummation of the acquisition is conditioned upon receipt of a favorable tax ruling.

V. TRADE AND COMMERCE

9. The relevant product market is the production of corrugating medium.

10. The relevant geographic market for corrugating medium is the West Coast market.

11. The production of corrugating medium in the West Coast region is substantially concentrated. In 1979, the top four firms accounted for 53.27 percent of production, and the top eight firms accounted for 85.39 percent. Menasha and Weyerhaeuser ranked third and seventh, with 13.07 percent and 7.44 percent of production, respectively. The acquisition would make Weyerhaeuser the number one firm in the region, with 20.51 percent of West Coast corrugating medium production.

12. Barriers to entry into corrugating medium production are high. Prime mill sites are in short supply; capital costs are high and increasing; long lead time is required to construct a new mill; environmental regulations increase the difficulty of new entry; and the new entrant

may encounter shortages of raw materials. In addition, high capital costs require entry on a large scale and a new entrant would have to be prepared to operate below capacity until demand grows or until market share can be taken away from competitors. The increase in capital costs over the past several years also gives new mills a higher cost structure than efficient older mills, putting new mills at a comparative disadvantage until higher cost mills subsequently are built. [4]

VI. ACTUAL COMPETITION

13. Weyerhaeuser and Menasha both are actual competitors in the production of corrugating medium in the West Coast market. Menasha produces corrugated medium on the West Coast at its mill in North Bend, Oregon. Weyerhaeuser produces corrugating medium on the West Coast at its mill in Longview, Washington.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the proposed acquisition may be substantially to lessen competition in the production of corrugating medium in the West Coast market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(1) It will eliminate Menasha as a competitive entity in the production of corrugating medium in the West Coast market;

(2) It will eliminate substantial actual competition in the production of corrugating medium in the West Coast market;

(3) It will significantly increase already high levels of concentration in the West Coast market, with four-firm concentration increasing from 53.27 percent to 60.71 percent and eight-firm concentration increasing from 85.39 to 91.32 percent;

(4) It will affect the availability of corrugating medium in the West Coast market.

VIII. VIOLATIONS CHARGED

15. The effect of the acquisition of Menasha by Weyerhaeuser and Weybuy may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Initial Decision by

John J. Mathias, Administrative Law Judge

October 11, 1983

Preliminary Statement

The Complaint in this matter was filed on February 9, 1981, and charges that the acquisition of a corrugating medium mill located in North Bend, Oregon (the "North Bend mill") from the Menasha Corporation by respondent Weyerhaeuser Company ("Weyerhaeuser") violates Section 7 of the Clayton Act and Section 5 of the FTC Act. The Complaint further alleges that [2] corrugating medium is the relevant product market (Complaint ¶ 9), and that the 11 western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming constitute the relevant geographic market, commonly referred to throughout this proceeding as the "West Coast." (Complaint ¶¶ 1(b), 10).

At the time the Complaint was filed, Weyerhaeuser had not yet consummated the acquisition and, therefore, the Complaint proposed enjoining the acquisition, as well as seeking other forms of relief. (Complaint at 6). Because Weyerhaeuser subsequently acquired the North Bend medium mill, complaint counsel now seek divestiture in this proceeding (CB at pp. 233 *et seq.*).

On December 12, 1980, the Commission sought to enjoin the acquisition pursuant to Section 13(b) of the FTC Act. 15 U.S.C. 53(b). An evidentiary hearing was held in the United States District Court for the District of Columbia in February 1981. Portions of that record have been stipulated into evidence in this proceeding by the parties. (Stipulation and Order of January 3, 1983).

On March 25, 1981, the District Court allowed the acquisition to go forward pursuant to the terms of a hold-separate order. Specifically, the order provided that Weyerhaeuser could own and operate the mill, pending a final determination on the merits of the acquisition in this proceeding, but that it could not (1) reduce the production of the North Bend mill without cause and prior court approval, or (2) give preference to Weyerhaeuser box shops in the distribution of the North Bend mill's production. *FTC v. Weyerhaeuser Co.*, 1981–1 Trade Cas. (CCH) ¶ 63,974 at 76,049 (D.C.D.C. 1981). (WX 1415 A-G).

The Commission appealed from the District Court's order. On September 1, 1981, the United States Court of Appeals for the District of Columbia Circuit upheld the District Court's order. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981). During the appeal process,

which included an unsuccessful petition for rehearing *en banc* by complaint counsel, proceedings in this matter were stayed.

After affirmance by the Court of Appeals, the District Court proceeded, as initially envisioned by its order of March 25, 1981, to put in place more specific terms concerning [3] Weyerhaeuser's ownership of the mill under the hold-separate order. On January 6, 1982, the District Court entered an order that implemented its March 25 order, and that order has been in operation since that time. (WX 1415A-G).

Once the appeal process was terminated, prehearing conferences were held in this proceeding. Extensive discovery occurred between the parties. In addition, third party subpoenas to various industry members were issued on behalf of both complaint counsel and Weyerhaeuser.

The hearing on the merits in this proceeding commenced on January 17, 1983, in Washington, D.C. Complaint counsel called 10 witnesses and concluded their case on January 31, 1983, with the testimony of their expert witnesses, Mr. Charles Pidano and Dr. David Kamerschen.

Respondent Weyerhaeuser began presentation of its case on February 16, 1983, in Seattle, Washington. As part of the west coast hearings, tours of Weyerhaeuser's Longview, Washington mill complex and Longview Fibre's mill complex, also in Longview, were conducted, as was a tour of Weyerhaeuser's Portland, Oregon box plant. Weyerhauser called 11 witnesses on the west coast, including 5 Weyerhaeuser executives and 6 third party witnesses. The west coast hearing ended on February 23, 1983.

Weyerhaeuser resumed presentation of its case in Washington, D.C. on March 14, 1983. During this phase of the hearings, Weyerhaeuser called 6 third party fact witnesses and concluded its case with the testimony of 2 expert witnesses: Mr. Thomas Clephane and Dr. Yale Brozen.

Complaint counsel presented no rebuttal testimony or evidence. Accordingly, the hearings were concluded with the record left open for purposes of admitting certain exhibits, correction of the transcript, identifying *in camera* portions of the record, and other miscellaneous matters. The record was closed on May 16, 1983.

In all, a total of 36 witnesses testified in this proceeding, 29 through live testimony at this proceeding and 7 through the stipulated introduction of the transcript of their testimony before the District Court in the Section 13(b) trial, generating a total transcript of nearly 4,000 pages. Approximately 800 exhibits have been received into evidence. [4]

This Initial Decision is based upon the entire record, including

proposed findings of fact and conclusions of law and supporting memoranda filed by the parties, as well as their replies. I have also taken into account my observation of the witnesses who have appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters. Any motions appearing on the record not heretofore or hereby ruled upon either directly or by the necessary effect of the findings and conclusions made in this Initial Decision, are hereby denied.

The findings of fact include references to the supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.[1] [5]

To summarize my findings and conclusions hereinbelow, I find that complaint counsel have failed to prove that the effect of respondent's acquisition may be substantially to lessen competition or to tend to create a monopoly. Accordingly, I order that the complaint be dismissed.

Findings of Fact

I. RESPONDENT WEYERHAEUSER AND THE ACQUISITION

1. Weyerhaeuser is a diversified forest products company headquartered in Tacoma, Washington and incorporated in the State of Washington. Weyerhaeuser has extensive international operations in the following areas: (1) timberlands and raw materials, which encompass the management, harvesting and distribution of timber, logs and wood chips; (2) wood products, including timber, softwood and hardwood, plywood and veneer, particleboard, and hardboards; (3) fiber products, such as containerboard, pulp, paperboard, paper, newsprint, containers and packaging; (4) real estate and home building; and (5) various diversified businesses, including personal care products, nursery products, chemicals and aquaculture. (WX 1113 H, N, R, V, Y, A2). Weyerhaeuser markets its products worldwide. In 1981, it had

[1] The following abbreviations have been used:

Tr. - Transcript, preceded by the name of the witness and followed by the page number.
CX - Complaint Counsel's Exhibit, followed by its number and the referenced page(s).
RX - Respondent's Exhibit followed by its number and the referenced page(s).
CF - Complaint Counsel's Proposed Findings.
CB - Complaint Counsel's Brief In Support of Proposed Findings.
RF - Respondent's Proposed Findings.
RB - Respondent's Memorandum of Law In Support of Proposed Findings.
CRB- Complaint Counsel's Reply to Respondent's Proposed Findings and Brief.
RRB- Respondent's Reply to Complaint Counsel's Proposed Findings and Brief.
IC - *In Camera.*

net sales of $4.5 billion and total assets of $5.7 billion. (WX 1113 C, A8).

2. Weyerhaeuser has three principal forest product business segments: (a) Building materials (including lumber, softwood and hardwood plywood and veneer, particleboard, hardboard, logs, chips and timber), with net sales in 1981 of $2.7 billion; (2) Pulp, newsprint, paper and paperboard products, with net sales in 1981 of $1.5 billion; and (3) Paperboard and packaging products, including containerboard[2] and shipping containers, [6] with net sales in 1981 of $939 million. (Complaint and Answer ¶ 2; WX 1113A–2, A–21, A–31; Waechter Tr. 1621–22).

3. Weyerhaeuser is a leading integrated producer of containerboard and corrugated boxes. (WX 1113; Findings 4–6, below). Containerboard mills are large, capital-intensive facilities. (Waechter Tr. 1635; Locke Tr. 978).

4. Prior to the acquisition here in issue, Weyerhaeuser operated three medium mills in the United States, located in Longview, Washington; Valliant, Oklahoma; and Plymouth, North Carolina. (CX 651, Stip. 1).

5. Weyerhaeuser also operates three liner mills in the United States, located in Springfield, Oregon; Valliant, Oklahoma; and Plymouth, North Carolina. (CX 651, Stip. 2).

6. Corrugated boxes are manufactured in shipping container plants ("box plants" or "box shops"). Weyerhaeuser operates approximately 30 box plants in the United States. On the west coast, it operates 9 box plants which are located in Alameda, Anaheim, Colton, Modesto, Salinas and Santa Paula, California; Olympia and Yakima, Washington; and Portland, Oregon. (CX 651, Stip. 3, 8). The Anaheim box plant was obtained by Weyerhaeuser in the 1981 acquisition discussed below, but is not at issue in this proceeding. (CX 651, Stip. 8; CB pp. 231–39).

7. During 1981, Weyerhaeuser acquired the following assets from Menasha Corporation:[3] (1) a medium mill located in North [7] Bend,

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[2] Containerboard refers to two different products: corrugating medium ("medium") and linerboard ("liner"). (CX 651, Stip. 42). These two products are the raw materials used to manufacture corrugated shipping containers ("corrugated boxes" or "boxes"). (CX 651, Stip. 43, 47). Medium is the inner fluted portion of the wall of a corrugated box, while liner is the flat facing comprising each side of the wall. (CX 651, Stip. 15, 41; Johnson Tr. 404; Countryman Tr. 1044.)

[3] Menasha Corporation is a Wisconsin corporation with its principal offices at Neenah, Wisconsin. A major portion of its business is the manufacture of corrugating medium and corrugated containers (Complaint and Answer, ¶ 4). Prior to the acquisition, Menasha Corporation owned and operated the North Bend medium mill that was acquired by Weyerhaeuser, and a second medium mill in Otsego, Michigan, which it retained. (CX 651, Stip. 70; CX 332 B, C & E).

Weyerhaeuser West Coast, Inc., a wholly-owned subsidiary of Weyerhaeuser with its principal office in Tacoma, Washington, is the corporation surviving the merger of Weybuy, Inc. (a Weyerhaeuser subsidiary formed solely to facilitate this acquisition) into the acquired Menasha Corporation. The complaint originally named Weybuy as a co-respondent. By order of February 1, 1982, Weyerhaeuser West Coast, Inc., was substituted for Weybuy to reflect the merger and change of name.

Oregon ("North Bend mill"); (2) a 710-acre unimproved mill site located in North Bend, Oregon; (3) three wastepaper collection facilities, two in Portland, Oregon, and one in Eugene, Oregon (and one sales office in Portland, Oregon) which collect wastepaper, principally old corrugated containers, to be recycled as a raw material in the manufacture of medium and other types of paper; (4) the box plant located in Anaheim, California; (5) an interest in Valley Crate Corporation which markets some of the corrugated containers produced at the Anaheim plant; and (6) $8.3 million of net working capital. (CX 651, Stip. 8). This acquisition was pursuant to an Agreement and Plan of Merger and Reorganization dated December 24, 1980 by which Weyerhaeuser acquired a corporate entity owned by Menasha Corporation's shareholders in exchange for approximately 2 million shares of Weyerhaeuser stock. (JX 25A-A60).

8. The Complaint challenges only the acquisition of the North Bend mill. (Complaint ¶ 9, 13; CB pp. 231–39). (*See also, FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1074 (D.C. Cir. 1981).

II. COMMERCE

9. Weyerhaeuser, Menasha, and Weyerhaeuser West Coast, Inc. were, at the time of the acquisition of the North Bend mill, and continue to be, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as [8] amended, 15 U.S.C. 44. (Complaint and Answer ¶¶ 3, 5; CX 651, Stip. 76).

III. MARKET OVERVIEW

A. *The Forest Products Industry*

10. Many of the firms in the containerboard industry are, like Weyerhaeuser, integrated forest products companies that manufacture and market a broad line of products. (Cassidy Tr. 734–35; Locke Tr. 910–11; Price Tr. 2187; Diforio Tr. 2096; Perry Tr. 2312; Brown Tr. 2442–43).

11. The operations of forest products firms frequently "are international in scope," and "a number of the companies are major exporters," with "some . . . hav[ing] operations in Canada" and other foreign countries. (Clephane Tr. 2621; *See also* Waechter Tr. 1643, 1729; CX 147 Z2–Z15 IC).

12. In general, forest products companies have integrated operations in (1) timber and raw materials management, (2) primary conversion, and (3) secondary conversion.

B. *Timberlands and Raw Materials Management*

13. Timberland operations are concerned with managing a company's timber assets, including the long-term replenishment of those assets, and insuring that the basic raw materials for downstream products are provided in a streamlined and efficient fashion. (Waechter Tr. 1624–25; WX 1113H-L).

14. For purposes of this proceeding, timber can be roughly classified as being either hardwood or softwood. Softwoods are found mainly in the south in the form of southern pine, and in the Pacific Northwest in the form of Douglas fir. (Brown Tr. 2515). Hardwoods are abundant in the north central portion of the United States and are heavily mixed in with southern pine softwoods in the southeast, but are relatively scarce in the Pacific Northwest. (Brown Tr. 2470; CX 147 Z62–Z63 IC).

15. Weyerhaeuser owns timber throughout the country, primarily in the Pacific Northwest, and in the southeast portion of the United States running from the Carolinas through Oklahoma and Arkansas. (Waechter Tr. 1628–29).

16. Numerous companies besides Weyerhaeuser own substantial timberlands in various parts of the country. For instance, [9] International Paper, which is one of the largest private timber owners in the United States, has the bulk of its timber in the southeast, as does Continental Forest. (Brown Tr. 2443; Perry Tr. 2312–13). On the other hand, Owens-Illinois and Champion International have substantial holdings of hardwood timber in the north central portion of the United States in states such as Wisconsin, Minnesota, and Michigan. (Cassidy Tr. 773–74, 839; Diforio Tr. 2098; *See also* WX 1702 Y-Z, A9–A12, A14–A17).

C. *Primary Facilities*

17. Primary facilities refer to mills that produce basic products derived from a company's timber base. These operations are basically divided into two broad product categories: wood and fiber. On the wood products side, the operations include saw mills, plywood mills, and other lumber producing facilities. (Waechter Tr. 1625, 1632). The fiber side includes facilities for the production of containerboard, market pulp, newsprint, fine paper and other similar types of products. (Waechter Tr. 1625). In total, Weyerhaeuser has 66 primary facilities, with 53 on the wood products side and 13 on the fiber side. (*Id.*).

18. The raw material for a wood products primary facility is harvested timber or logs, which are cut up into lumber or plywood. For fiber products, the raw material is sometimes the residual wood chips

that result from wood product manufacturing. Otherwise, whole logs may be cut up or "chipped" expressly for use as the raw material needed for the fiber mill. (Presson Tr. 1538; Locke Tr. 967).

19. Primary mills typically are large facilities that consume vast amounts of raw material. Weyerhaeuser's Valliant, Oklahoma mill, for instance, produces "3,000 tons of containerboard a day" and will consume "something in excess of a million tons of wood chips" annually. Weyerhaeuser's Plymouth, North Carolina facility produces "in excess of 2,000 tons a day of fiber products" and also consumes "close to a million tons of wood chips a year." (Waechter Tr. 1635).

D. *Secondary Facilities*

20. Secondary operations or facilities refer to plants that typically refine or further convert basic wood or fiber products provided by primary mills. Thus, Weyerhaeuser's box plants take containerboard manufactured by Weyerhaeuser's primary fiber mills and convert it into boxes. (Presson Tr. 1539). [10]

E. *The Relationship Of Timber To Converting Operations*

21. For any forest products company, timber plays a central role. Indeed, Weyerhaeuser views its timber as its basic asset. (Waechter Tr. 1631). The desire to maximize the value of their timber holdings has led forest product firms to develop and expand primary and secondary facilities. Weyerhaeuser's initial involvement in the containerboard industry was a result of its "desire to utilize the residual flow of wood chips" stemming from its other operations. (Waechter Tr. 1645). Similarly, in planning new primary facilities, it seeks to match "the raw material flow available in a vicinity . . . ." (Waechter Tr. 1641). Accordingly, forest products companies generally locate their primary mills in the areas where their timber holdings are located. (Waechter Tr. 1641; Cassidy Tr. 839; Perry Tr. 2313; Countryman Tr. 1069, 1096; Locke Tr. 969; Brown Tr. 2444).

IV. CONTAINERBOARD PRODUCTION

A. *General*

22. Corrugating medium (often referred to simply as "medium") is a wood fiber-based paper product that is used almost exclusively to form the fluted inner layer of corrugated board, which in turn is cut into corrugated sheets which are used almost exclusively in the manufacture of corrugated containers. (CX 651, Stips. 14, 15, 43; CX 13A; CX 25I; CX 45P, X; Waechter, CX 64Z58; CX 186K; CX 190B; Hudson, JX 8J; Johnson Tr. 404–05; Campbell Tr. 645; Countryman Tr. 1044; Waechter Tr. 1652, 1754). Medium essentially has no other uses out-

side the manufacture of corrugated containers.[4] (Waechter Tr. 1652, 1754; Johnson CX 63Z103; Presson CX 65Z56–Z57; CX 167A).

23. Corrugated board typically consists of two sheets of linerboard (a different wood fiber-based paper product) with a fluted sheet of medium in between. (CX 651, Stip. 42; Johnson [11] Tr. 404, 409; Wollenberg Tr. 527–28; Campbell Tr. 645; Countryman Tr. 1044; CX 190B).

24. Linerboard (sometimes referred to simply as "liner") is a wood fiber-based paper product that is used as the flat outer facings of corrugated board. (Johnson Tr. 404, 409; Wollenberg Tr. 527; Campbell Tr. 644; Countryman Tr. 1044; CX 651, Stips. 38, 41, 42; CX 25I; CX 190B). Linerboard also is used for a number of other applications, such as fiber drums, carrier stock, and some folding cartons. (Waechter Tr. 1652, 1754–55; see WX 1334K, L). Both medium and linerboard are sometimes referred to generically as "containerboard." (CX 651, Stip. 42; Johnson Tr. 464).

25. Corrugated containers (often referred to as "corrugated boxes" or just "boxes") are strong, lightweight and relatively inexpensive shipping containers that are made from corrugated sheets and that are produced in a variety of shapes and sizes. (CX 44D, Z9–Z28; Lamm Tr. 1004, 1015; Nordstrom Tr. 1127, 1146). They are used for packaging and shipping a wide variety of products, such as canned and bottled goods, agricultural products, meats and other foods, clothing, drugs, appliances, and numerous other products. (CX 44D, E, Z; CX 186J; CX 13A-B; CX 109Z1; Johnson Tr. 404–05; Wollenberg Tr. 528–29).

26. Corrugating medium is designed to provide corrugated board (and hence, corrugated boxes) with stiffness, rigidity, crush strength, and compression strength. (CX 25I; CX 190S, Z24; Johnson Tr. 405, 406; Wollenberg Tr. 528, 533, 547; Campbell Tr. 651; Cassidy Tr. 779–81). Crush strength refers to the ability to keep the two sheets of linerboard apart to form a rigid structure (Cassidy Tr. 779; Johnson Tr. 405; Wollenberg Tr. 528), while compression strength refers to the top to bottom stacking strength. (Johnson Tr. 405; Cassidy Tr. 780).

27. Medium must weigh at least 26 pounds per thousand square feet and be at least nine thousandths of an inch thick[5] in order to meet the requirements of Rule 41 of the Uniform Freight Classification (for rail) and Item 222 of the National Motor Freight Classification (for trucks), which prescribe [12] carrier requirements for corrugated con-

[4] "Off-grade" medium may occasionally be used for wrapping or padding purposes, but such uses are *de minimis*. (Johnson Tr. 405).

[5] Thus, medium of this thickness is sometimes referred to in the industry as "nine-point" or ".009." (Wollenberg Tr. 530).

tainers.[6] (CX 29I; CX 44Z39–Z54, Z64–Z68; CX 109Z182; CX 190Z32; Johnson Tr. 409; Wollenberg Tr. 530; WX 1201; WX 1202). In addition, medium must meet certain established specifications, including "concora," which is the industry's measure of crush strength. (CX 186Z11; CX 44X, Z29–Z30; WX 1105H-J; WX 1104A; CX 190S, Z24, Z26; Johnson Tr. 407–08; Wollenberg Tr. 530–31).

28. Linerboard, in contrast to medium, is designed to provide corrugated board with burst strength and tear strength rather than with stiffness, rigidity, crush strength or compression strength. (Johnson Tr. 409; Wollenberg Tr. 531–33; Cassidy Tr. 780–81). Linerboard must also meet certain requirements established by Rule 41 and Item 222. (CX 44Z39–Z54, Z63–Z68; Johnson Tr. 409; CX 107G). In particular, linerboard must meet certain established specifications with respect to "mullen," which is the industry measure of burst strength. (Johnson Tr. 409–10; Wollenberg Tr. 533; CX 44Z39). Since linerboard is used for the outer facings of corrugated boxes, it also is designed to have a smooth surface and desirable printing characteristics. (Campbell Tr. 651).

29. Medium is produced in standard "basis weights," which are measured in pounds per thousand square feet of product. (CX 190Z21; CX 651, Stip. 56; Cassidy Tr. 775). The most common basis weight for medium is 26 pounds per thousand square feet; the second most common is 33 pounds. (CX 651, Stip. 33; Johnson Tr. 437–38; Cassidy Tr. 775–76; Countryman Tr. 1044–45; Presson Tr. 1541, 1610; Diforio Tr. 2120; Perry Tr. 2376; CX 190S; CX 1B; CX 26V). Other weights (such as 36 pound or 40 pound) and types (such as "wet strength" medium that is specially treated for moisture resistance for use under high humidity conditions) (Cassidy Tr. 745) are generally considered to be specialty items. (Countryman Tr. 1044; Presson Tr. 1541; Diforio Tr. 2120). According to the American Paper Institute ("API"), an industry trade association, there were approximately 5.7 million tons of medium produced domestically during 1981. (WX 1334H). Of this amount, 79.5% was classified as "regular" 26 pound, 12.7% was "regular" 33 pound, 3.7% was other "regular" grades, [13] and 4.1% was classified in various "wet strength" categories. (Calculated from WX 1334H).

30. Linerboard is also produced in standard basis weights. (*E.g.*, CX 190Z21). The most common basis weight for linerboard is 42 pound, which according to API accounts for about one-half of total domestic linerboard production. (WX 1334E). The next most common weight is 69 pound, which accounts for nearly 22% of total linerboard production. (WX 1334E).

[6] Failure to comply with the requirements could subject a shipper to substantial penalties, such as increased transportation charges, refusal of shipments by the carrier, or denial of freight damage claims. (CX 44Z–32).

B. *Medium Production*

31. The production of medium and liner is a continuous process that consists of: (1) the procurement of raw materials; (2) the preparation of a pulp, which is then formed, pressed and dried into a sheet of medium or liner; and (3) a series of finishing operations that meet the individual customer's particular needs.

32. There are two basic types of medium: semichemical and recycled. (CX 651, Stip. 16). Semichemical mills differ from recycled mills primarily in the type of raw material that they use for the pulp or "furnish" that is converted into medium on the paper machine. Semichemical mills predominantly use a "virgin" or wood fiber as their raw material, while recycled mills use exclusively recycled material. (CX 651, Stip. 19, 22). However, most semichemical mills use some proportion of recycled fiber with virgin fiber in making semichemical medium. (CX 651, Stip. 19, 21).

33. Semichemical medium is produced primarily from hardwood because the relatively short fibers found in hardwood provide medium with its needed rigidity and crush strength. (CX 29D; CX 45X; CX 48Z35; CX 109Z177; CX 137B IC; CX 190Z14; Johnson Tr. 405, 406; Wollenberg, Tr. 538, 547; Campbell Tr. 650; Cassidy, Tr. 742; Brown Tr. 2470; CX 45X). Weyerhaeuser's mill at Longview, Washington, along with Willamette's mill at Albany, Oregon and Boise Cascade's mill at Wallula, Washington, are unusual in the industry because they use a special process (called the "two-stage vapor" or "TSV" process) to make semichemical medium pulp from softwood (CX 186V, Z11; CX 26G, H; WX 1737 A, B) because hardwood is not as plentiful in the Pacific Northwest as it is in the South and the Midwest. In general, hardwood is obtained from deciduous trees that shed their leaves, such as oak or alder; softwood is obtained from evergreen (needle-bearing) trees, such as pine and Douglas fir. (Wollenberg Tr. 538, 546). [14]

34. A primary raw material used in semichemical medium, especially in the northwest, is "residual" chips obtained from nearby or adjacent "wood products operations" such as lumber or plywood mills. (Presson Tr. 1538). In addition to residual chips, whole logs may be "chipped" to provide the raw material needed for semichemical production. (Johnson Tr. 411–12, 415; Locke Tr. 967; Cassidy Tr. 760).

35. While medium producers generally locate their facilities near their own timberlands (Finding 21), producers must still rely on outside sources to procure and deliver a substantial portion of either the wood chips or pulp wood used by the mill. (Johnson Tr. 446; Locke Tr. 913, 967–68; Brown Tr. 2456).

36. Because semichemical medium mills typically rely on outside

sources for at least half of their wood chip needs, they frequently spawn a network of independent businessmen or local contractors who procure and deliver these wood chips to the mill. These suppliers operate low-margin businesses that are heavily dependent on the local mill's orders, and, at least in some cases, rely on the mill to obtain financing for their operations. (Johnson Tr. 446–47, 480).

37. As the name suggests, recycled medium mills use recycled materials as their raw material. These materials may be in the form of box plant or "kraft" clippings, which refer to the scraps of containerboard collected at box plants from trimming and cutting containerboard as it is converted into boxes. (Campbell Tr. 652–53, Johnson Tr. 407, 426).

38. The largest source of recycled material is old corrugated containers ("OCC"). OCC is typically procured from a large number of sources by independent operators or dealers who supply the mill. (Countryman Tr. 1063–64).

39. As noted, many semichemical mills also use recycled fiber as part of their furnish. However, since semichemical medium mills tend to be located in timber areas (CX 651, Stip. 35), they have procurement systems for OCC that cover a wider area than do those of recycled mills located near metropolitan areas. (Countryman Tr. 1099–1100; Locke Tr. 974). For instance, MacMillan Bloedel's new semichemical medium facility in Pine Hill, Alabama draws OCC from six states. (Locke Tr. 974). [15]

40. Because of the difference in their raw materials, semichemical and recycled mills have different processes for converting the raw material into the pulp or "furnish" used to form a sheet of medium. In a semichemical mill, the wood chips undergo a chemical cooking process that breaks down the chips into individual wood fibers. While there are a number of different chemical processes used to cook wood chips, basically the chips are cooked at a high heat with various chemicals in enormous vessels called digesters. (CX 651, Stip. 25; Johnson Tr. 417–20; Cassidy Tr. 760–61).

41. While the production of semichemical medium requires the use of a pulp mill to transform wood chips into pulp, a recycled mill employs a "hydropulper," which is somewhat akin to a large blender or garbage disposal, to break down the recycled materials into a pulp or furnish for the paper machine. (CX 651, Stips. 24, 26, 27).

42. In recent years, there have been a number of technological developments, such as the use of "reverse cleaners," that improve the quality of OCC that goes into the hydropulper. (Countryman Tr. 1099; Waechter Tr. 1694; Brown Tr. 2464; Justus Tr. 2261).

43. Semichemical mills that use recycled material as part of their

furnish have both a chemical pulping system for wood chips and a hydropulper for recycled materials. (Johnson Tr. 425–26).

44. Recycled and semichemical mills have essentially identical operations in converting their different pulps into sheets of medium. (CX 651, Stip. 28). At either type of mill the pulp is fed onto the paper machine through a device called a "headbox." (Johnson Tr. 427). The paper machine itself is a very large piece of equipment the length of a football field and two stories high, and can be designed to manufacture a variety of papers. (CX 651, Stip. 29, 31).

45. The production of medium is a continuous process, with a steady flow of wood pulp slurry fed onto a long, high-speed wire mesh (the fourdrinier), which propels the wood or recycled pulp slurry into a large press at rates of up to a half mile per minute. Virtually all paper machines employ a fourdrinier forming section. (CX 651, Stip. 28). From the press, the pulp emerges as flat paper to be further pressed and dried through a series of large, rapidly revolving heated metal cylinders called "dryers." The medium is run from these cylinders onto rolls at [16] a rate of up to 20 miles of paper per hour. These large rolls, which can weigh up to 30,000 pounds or more, are then trimmed into smaller rolls equal to the widths ordered by a customer. (CX 651, Stip. 30).

C. *Mill Economics*

46. Semichemical medium mills are typically large, capital intensive facilities. The paper machine itself is a massive piece of equipment, and the pulping facility at a semichemical mill consists of several large digesters and boilers, a chemical recovery system and extensive raw material handling operations. (CX 651, Stip. 29; CX 649; CX 650A-P). The minimum efficient size of a new semichemical mill is presently approximately 600 tons per day. (Locke Tr. 925).

47. Recycled medium mills are usually smaller than semichemical mills, primarily because they have a less extensive raw material handling system and no digesters and chemical recovery operations. (Johnson Tr. 492–93). Nevertheless, they are still capital intensive operations that also benefit from economies of scale. While the evidence varies somewhat, the current minimum efficient size of a recycled mill would be approximately 300 tons per day to 500 tons per day. ([***]* Countryman Tr. 1082–83).

48. In all, there are a total of 54 medium facilities throughout the United States: 33 are semichemical and 21 are recycled. There are 11 companies operating 13 medium mills on the west coast. (WX 1351A; WX 1354A part IC). Of the 13 medium mills on the west coast, 7 are semichemical and 6 are recycled. (WX 1351A). These west coast mills

* Throughout this document, [***] refers to *in camera* material that has been excised.

range in capacity from 69 tons per day to 495 tons per day. (WX 1354A part IC).

49. Because both recycled and semichemical mills have high fixed costs of operation, producers have strong incentives to maximize production. (Cassidy Tr. 875; Locke Tr. 978; Countryman Tr. 1107; Presson Tr. 1603; Waechter Tr. 1713; Brown Tr. 2482; Duffie JX 3F; Williscroft JX 4J).

50. Output reductions, either shutdowns or slowdowns, penalize a producer because they lower the number of tons or units over which the mill's costs are defrayed. All fixed costs, including depreciation and interest, continue, as do many of the variable costs as well. (Johnson Tr. 498). Continuing variable costs may include the mill's labor force and the cost of raw materials (some mills have "take-or-pay" contracts that [17] require the mill to purchase raw materials regardless of whether they are needed.) (Wollenberg Tr. 616–17; Locke Tr. 944; Johnson Tr. 498).

51. Mill shutdowns may also have adverse long-term effects on a mill's relationship with its raw material suppliers. (Johnson Tr. 480–81; Locke Tr. 975; Countryman Tr. 1065, 1099).

52. Another category of costs associated with a shutdown is the cost of taking the mill down and starting it back up into production. Any shutdown that results in the boiler and chemical recovery systems becoming idle, or the mill becoming "cold" is quite expensive. (Locke Tr. 962 IC; Campbell Tr. 687–88; Brown Tr. 2475 IC, 2465, 2482).

53. Slowdowns in production are similarly expensive and uneconomical. A slowdown both increases costs and reduces output. Therefore, containerboard mills make every effort to avoid such slowdowns under normal conditions. (Johnson Tr. 496–97; Cassidy Tr. 819; Countryman Tr. 1107; Brown Tr. 2483–84; Presson Tr. 1601–02; Williscroft JX 4 J-K).

D. *Mill Optimization*

54. Virtually all medium is consumed by individual box plants. (CX 651, Stip. 43). Those box plants have diverse needs in terms of the weight, width, grade and other specifications of the medium they convert into boxes. Accordingly, producers engage in sophisticated and complex scheduling in order to maximize production while, at the same time, tailoring that production to the particularized needs of various box plants. (Findings 55–69, below).

55. Orders for medium regularly vary with respect to a wide range of factors. To begin with, medium must be produced in accordance with a number of specifications. (Presson Tr. 1544–45; *See also* WX 1105 A-R; WX 1106 A-B; Wollenberg Tr. 530–33). Each of these specifications may be altered at the demand of the customer. As explained

by Mr. Edward Locke of MacMillan-Bloedel, "[y]ou can specify the burst strength, tear strength, the tensile strength, the compression strength, the rate of air passage through a sheet. Any of these are quite common. Some people change the basis weights specifications . . . . All of these have to be translated in the process into a set of running conditions that may determine pulping conditions, a different time to pulp it, and may take a different amount of refining." (Locke Tr. 929). These changes in specification by customers may also alter other steps in the production process. (*Id.*). [18]

56. Medium orders also vary by basis weight, which refers to weight per thousand square feet ("msf"). (CX 651, Stip. 56). Medium is produced in the following weights: 26 pound, 31 pound, 33 pound, 36 pound, 40 pound, 52 pound and even heavier weights (Johnson Tr. 438; Countryman Tr. 1044; WX 1153 V-A3 IC; WX 1508 Z1). While the most common medium basis weights are 26 pound and 33 pound (CX 651, Stip. 33), there is a steady demand for other weights as well. (Waechter Tr. 1653; Presson Tr. 1610–11).

57. Medium may also be distinguished by being "functionally treated." (Presson Tr. 1541; 1611). For instance, medium may be "wax impregnated" or possess "wet strength" which results in the medium being able to resist moisture. Such grades occur in different weights, and are required by box plants to make boxes for goods that must be insulated from moisture. (*Id.*).

58. There are also types of medium that possess a "higher strength" than do normal grades of medium of the same weight. (Presson Tr. 1611). A notable example is a proprietary grade of medium manufactured by Stone Container called "Super Stone Cor." (Price Tr. 2195). Due to its higher strength, "Super Stone Cor" allows you to "reduce the liner weights" and, therefore, "reduce total fiber in a particular box and maintain box performance." (Price Tr. 2195).

59. Orders particularly vary on the basis of roll width. There is no standardized width for medium rolls since it "is cut into widths during the production process to meet the particular needs of the customer." (CX 651, Stip. 78). Mr. Timothy Campbell of Southwest Forest stated that a "typical box plant . . . will have as many as 20 different sizes of medium in their inventory." (Campbell Tr. 690). Likewise, Mr. Fred Cassidy of Owens-Illinois testified that "[b]ox plants order [medium] in various widths, and they will vary that width by up to an eighth of an inch, 85–1/8, 75–7/8 inches wide, like that. So they order a lot of different widths." (Cassidy Tr. 877). Mr. Clark Johnson of Virginia Fibre also testified that there was "no" standardized width of medium. (Johnson Tr. 497).

60. In addition to trim widths and grades, box plants may "specify either the number of rolls or tons of each inventory item, and also

specify the roll diameter . . . . They can specify specific stenciling or packaging requirements as well as timing requirements. So there are a variety of customer requirements [19] other than just the individual grade and width." (Presson Tr. 1543; *See also* Johnson Tr. 431).

61. Because orders for medium can vary on many factors, it is generally manufactured to fill specific customer orders. It is not produced for or sold out of inventory. (Wollenberg Tr. 577, 579; Campbell Tr. 690–91; Presson Tr. 1543–44, 1547; WX 1153 A-A4 IC).

62. Even if a producer could predict customer orders, most mills simply do not possess the physical space to house any significant inventory of medium. As explained by Mr. Presson, "[w]e basically don't have any inventory space at the mills." (Presson Tr. 1547). Mr. Fred Cassidy testified that of Owens-Illinois' four containerboard mills throughout the United States "[p]robably Orange [Texas] has more than anyone and maybe they can store 100 tons . . . . [W]e have no real capacity to store paper in our mills. We have no mill warehouses." (Cassidy Tr. 877; *See also,* Johnson Tr. 497).

63. Medium is particularly difficult to inventory since, unlike liner, it is more perishable, and therefore, unable to be stored outdoors. (Locke Tr. 947).

64. Even those mills with warehouses have very limited capacity for storage of finished product. For instance, MacMillan Bloedel's new Pine Hill, Alabama liner-medium complex has a total inventory capacity for *both* liner and medium for "roughly four or five days of production," or approximately for two days of medium production. (Locke Tr. 947).

65. Nor can a producer use nearby box plants that it owns to build up an inventory. Producers seek to keep the "lowest possible inventory level." (Presson Tr. 1549). The problem with large inventories at box plants was described by Mr. Michael Sanzone, General Manager of Weyerhaeuser's Portland, Oregon box shop: "It is extremely expensive when you talk in terms of inventory of roll stock, it's very easy to have over a million dollars tied up in roll stock inventory . . . . Basically . . . as it sets on the floor it's dead dollars." (Sanzone Tr. 1781).

66. Medium's customized production coupled with the lack of any inventory capacity significantly complicates the producer's task of optimizing production or to "minimize the total delivered costs and at the same time satisfy customer requirements." (Presson Tr. 1551). [20]

67. A primary example of mill optimization concerns the producer's ability to "trim its machine" efficiently. As explained by Mr. Presson, a medium machine that has the ability to make a sheet of medium 200 inches across, but which has an order for one 100-inch roll and one

80-inch roll of medium will have 20 inches of trim loss or waste in the production of that sheet, whereas an order for two 96-inch rolls results in only 8 inches of waste. (Presson Tr. 1552–53). Accordingly, producers strive to group odd sized orders together to lower trim loss and to maximize production of trim widths that result in very little trim loss. To this end, Weyerhaeuser uses trim management reports, which list trim widths for *all* of its customers, and then groups them in the most efficient manner for production. (Presson Tr. 1587–89; WX 1146A-B; WX 1147A-C).

68. Frequent grade changes also increase production costs. For instance, Mr. Cassidy of Owens-Illinois explained that "we would like to stay on the same grade all the time. Every time I change grades . . . I lose about ten tons." (Cassidy Tr. 821–22; *See also,* Presson Tr. 1555–56).

69. Thus, some companies schedule production on a system-wide basis, in order to maximize the production and efficiency of each mill. (Perry Tr. 2378; Presson Tr. 1551, 1557; Brown Tr. 2466 IC). Such efficiencies are also accomplished through exchanges with mills of other companies, as will be more fully explained below. (Findings 93–95).

E. *Liner Production*

70. Approximately 97 percent of the liner produced in the United States results from the kraft (sulphate) chemical pulping process; hence, the term "kraft liner." (CX 622F). Liner mills use wood chips derived principally from softwood timber, such as Douglas fir and southern pine. (Brown Tr. 2454; Johnson Tr. 409). Liner is produced in mills similar to, but typically larger than, semichemical medium mills, and the minimum efficient size for new linerboard mills is approximately 1,000 tons per day. (WX 1337D).

71. There are 53 liner mills in the United States, of which 44 use the kraft manufacturing process and 9 use recycled materials exclusively. Of the 13 liner mills located on the west coast, 10 produce kraft liner and 3 produce recycled liner. (WX 1351A). These west coast mills range in capacity from 65 tons per day to 1830 tons per day. (WX 1356A). [21]

72. The pulp and pulping process for making linerboard is similar, but somewhat different from the pulp and pulping process for medium. The pulp used in linerboard is produced primarily from softwood chips because the longer softwood fibers provide the tear strength and burst resistance necessary for linerboard. (CX 29B; CX 45X; CX 107G; CX 109Z175; CX 190T; CX 651, Stip. 39; Johnson Tr. 409; Wollenberg Tr. 546–47; Campbell Tr. 648, 651). The chipping, debarking, and chip screening steps are similar for both products. (CX 190Z13). From the

cooking process on, however, the two processes differ. (CX 190Z13, Z1–Z2; CX 186U, Z10; Cassidy Tr. 763).

73. As noted above, most linerboard pulp is produced through the "kraft" (sulfate) process.[7] (Wollenberg Tr. 527, 547; Campbell Tr. 647; CX 186V; CX 190Z2–Z3, Z4). The digesters used to produce kraft pulp are different from the digesters used for semichemical pulp. (Wollenberg Tr. 549). The chemical liquor used in the kraft process is a mixture of sodium hydroxide and sodium sulfide. (CX 186V; Campbell Tr. 651). The process for producing kraft linerboard pulp is a "full chemical" process, *i.e.*, the lignin is fully dissolved by chemical means without further mechanical refining (Johnson Tr. 420; Wollenberg Tr. 547), and the yield (ratio of output volume to input volume) is only about 50%. (CX 29B; CX 109Z175; CX 186V; Campbell Tr. 649; Cassidy Tr. 765). [22]

74. Fourdrinier paper machines used to produce linerboard also differ somewhat from those used to produce medium. (Johnson, CX63Z96; Wollenberg Tr. 552–53; Campbell Tr. 651; Countryman Tr. 1045–46). A linerboard machine uses a second headbox, through which a finer grade of fiber solution is laid on top of the slurry that has been fed onto the wire mesh from the first headbox, in order to create a uniform surface that is suitable for printing and, sometimes, to put special coatings on the linerboard. (Wollenberg Tr. 552; Cassidy Tr. 758–59; Countryman Tr. 1046–47). Further, since linerboard has different handling and operating characteristics on the fourdrinier machine and is generally a heavier grade than medium, linerboard machines generally have different pressing sections (Countryman Tr. 1047–49) and more dryers than medium machines, and are equipped with calendar stacks for finishing purposes. (Wollenberg Tr. 551–52; Cassidy Tr. 758–59; Countryman Tr. 1049–50).

75. The similarities between liner and medium facilities, though, allow almost any liner machine to be converted to medium production at small expense. (Justus Tr. 2288–92). The second headbox can be removed and adjustments would have to be made to the dryers, since medium does not require as much drying time. (Countryman Tr. 1050; Cassidy Tr. 758–59). However, there is evidence of inefficiencies in such conversion. (Countryman Tr. 1050; Findings 160–163, below).

76. The kraft pulping process used for liner in addition to being

[7] Another process, called the "sulfite" process, may be used if the linerboard is to be bleached. (CX 190Z2). Linerboard may also be produced from recycled materials. (Wollenberg, Tr. 527). However, recycled linerboard (frequently called "jute") (CX 190Q) generally is not substitutable for kraft linerboard in most applications. (CX 107I; CX 190Q-R; Wollenberg Tr. 586). Jute has a lower bursting strength than kraft linerboard, so that a heavier weight must be used to achieve a suitable bursting strength, which increases handling and shipping costs for the box user and creates problems in conforming to Rule 41 standards. (CX 107I; CX 140Z144; CX 190Q-R; Brundage, JX 5Q). Accordingly, the process has been steadily declining in use (CX 107I), so that less than 2.5% of total domestic linerboard for corrugated and solid fiber boxes is made from recycled fiber (WX 1334D; CX 107F, I; CX 152Z92, Z97 IC; CX 168D; *see* CX 144M; CX 145N; *cf.* CX 180T), and much of that is used only for the inside portion of corrugated boxes. (Wollenberg Tr. 586).

somewhat different from the semichemical pulping process used for medium, also tends to yield less furnish per ton of chips than does the semichemical process, primarily due to the less dense nature of softwoods. (Cassidy Tr. 765–66). However, as noted, some medium mills use softwoods as their raw material (Finding 33), and the digesters used to cook chips at a liner mill are similar to those used at a medium mill. (Justus Tr. 2291).

77. Liner mills are also capital intensive facilities, and therefore, have high fixed and quasi-fixed costs. Accordingly, like medium mills, they must be run on a maximum utilization schedule in order to realize the efficiencies of their scale and specialization. (Brown Tr. 2482; Campbell Tr. 666–67; Waechter Tr. 1713).

78. Like medium, liner is manufactured to various specifications and is produced in different basis weights: 26, [23] 33 (lightweight), 38, 42, 69 (middleweight), and 95 (heavyweight) pounds per thousand square feet (msf), and different trim widths. (Campbell Tr. 718; Presson Tr. 1541). In addition, there are a number of specialty grades of linerboard that have different surface finishes or colors such as brown, "mottled white" (gray) and "bleached" (white). (Presson Tr. 1541).

79. Liner may also be treated with chemical applications to provide it with various characteristics, such as moisture resistance, and there are a number of proprietary brands of liner which possess certain characteristics that their producers believe have a competitive significance. (Cassidy Tr. 860–61).

80. As a consequence of these various specifications, liner mills have the same inability to build inventories as medium mills. (Campbell Tr. 690).

F. *Swing Mills*

81. A number of mills have the present capability of making either liner or medium. Due to this flexibility, they are commonly known as "swing" mills. A swing mill may also refer to a mill that makes products other than just containerboard, such as mills that make either liner or kraft sack ("grocery sack"). (CX 313B; Wollenberg 533–35).

82. There are three swing mills on the west coast. Crown Zellerbach's recycled mill in Antioch, California produces both recycled liner and recycled medium. (CX 316B). Willamette Industries (Western Kraft) also has a recycled swing mill in Port Hueneme, California, which can produce either medium or liner. (WX 1200111 T). Longview Fibre's mill complex makes semichemical medium on up to five of the complex's 11 paper machines. (Wollenberg Tr. 535).

G. *Mill Complexes*

83. Weyerhaeuser and other producers frequently attempt to place their primary fiber mills at sites where they have other facilities in order to attain certain efficiencies. For that matter, the North Bend mill is the only Weyerhaeuser medium facility that is not, at present, part of a complex that produces either liner or some other fiber product. (WX 1303 G; Waechter Tr. 1625, 1634). Nationwide, there are 36 containerboard complexes, with 12 on the west coast. (WX 1351 A). [24]

84. A major reason for mill complexes is to allow producers to better utilize timber in nearby areas. (Locke Tr. 915, 968; Countryman Tr. 1096; Brown Tr. 2454). In addition to better utilization of timber stands, mill complexes also allow producers to attain efficiencies in other areas, such as, "cross-recovery" of chemicals in the pulping process (Johnson Tr. 451, 486–87; Locke Tr. 971; Brown Tr. 2456–57), common raw materials handling (Waechter Tr. 1626), shared transportation costs (Brown Tr. 2457), shared administrative costs (Locke Tr. 971), and "thermal efficiencies". (Locke Tr. 971–72).

V. THE DISTRIBUTION AND MARKETING OF CONTAINERBOARD

85. Shipments of medium fall primarily into one of three categories: shipments by vertically integrated medium producers to their own box plants; shipments to box plants of other companies in exchange for medium or liner (commonly referred to as "trades" or "exchanges"); and shipments pursuant to outside sales. (CX 651, Stip. 54). In addition, producers may use brokers to distribute a portion of their production. (Findings 112–117).

A. *Internal Consumption*

86. Since box plants are the only marketing outlet for medium (CX 651, Stip. 43), and since producers have significant and substantial incentives to optimize mill scheduling (Findings 46–53), many containerboard producers have integrated forward into box production. Thus, Weyerhaeuser's major purpose in both initially acquiring box plants as well as expanding them over the years is to obtain "a stable customer base" that allows it to plan more efficiently the various production runs it needs to make in the course of a year. (Waechter Tr. 1648).

87. In 1979, at least 30 of the 41 U.S. producers of corrugating medium also produced corrugated containers. (CX 651, Stip. 65). Ten of the 11 companies that presently produce corrugating medium on the west coast have box plants there as well. (WX 1737 A-D).

88. With the high degree of forward integration that exists in the

industry, most of the corrugating medium produced is consumed directly, or indirectly through exchanges, by plants owned by containerboard producers. (CX 651, Stip 66). Nationwide, Weyerhaeuser directly consumes "about 70 percent" of its containerboard production in its own box shops. (Waechter Tr. 1651). [25]

89. In supplying their box plants with containerboard, producers charge the plants a "transfer" price. [***]

B. *Exchanges*

90. Another common form of distribution in the industry involves "exchanges" or "trades." Exchanges have been prevalent in the industry for a substantial number of years. (Wollenberg Tr. 602). Under an exchange agreement, one producer ships medium or linerboard to a second producer's box plant in exchange for shipments of medium or linerboard to one of the first producer's box plants. Exchanges can be liner for liner, medium for medium, or medium for liner. (CX 651, Stip. 59).

91. [***]

92. Trades or exchanges serve several important purposes. *First,* they are frequently used to reduce freight charges by reducing shipping distance. (CX 651, Stip. 63). For instance, Weyerhaeuser's North Bend mill ships medium to Owens-Illinois' box plant in the San Francisco Bay area in exchange for Owens-Illinois' Tomahawk, Wisconsin mill shipping medium to Weyerhaeuser's box plant in Rochester, New York. (WX 1123 A IC; Cassidy Tr. 855). This transaction results in significant freight savings for both companies because it allows them to source their box plants with medium from mills of other producers that are much closer to their box plants than are their own mills.

93. *Second,* trades are used to maximize the trim efficiencies of mills. (Findings 67–69). Because box plants have varying sizes of corrugators, a given producer's box plants [26] may require roll widths that do not allow its mills to minimize their waste or trim. Through an exchange agreement, that box plant may be able to obtain the medium it needs from another mill that has available the specific trim. (Cassidy Tr. 789–90; Diforio Tr. 2111, 2151–52; Price Tr. 2207; Presson Tr. 1566–67; Johnson JX 6 L; Johnson Tr. 465; Campbell Tr. 664).

94. *Third,* exchange agreements foster mill optimization by allowing longer production runs of a grade or basis weight. Some mills also produce one grade more efficiently than another. An exchange agreement may allow both producers to specialize their own production while at the same time securing a steady supply of various grades to their respective box plants. (Cassidy Tr. 793–94; Campbell Tr. 664; Presson Tr. 1567–68; Price Tr. 2207; Perry Tr. 2325).

95. Trades also enhance the efficiency and growth of box shop operations. As Mr. Waechter stated, trades have "enabled us to, certainly on a total system basis, keep our costs as low as possible, far more than we could with only our own facilities. It's enabled us to trade into our system some grades that we don't make or don't make economically. So it gives your converting business a very broad source of supply." (Waechter Tr. 1650–51).

96. Without trades, box prices might be higher. Mr. Price of Stone Container testified that one of the reasons his company engages in trades is to "improve the efficiencies of the box plants. . . ." (Price Tr. 2207; *see also,* Wollenberg Tr. 603; Waechter Tr. 1757).

97. Trades are easy to arrange; companies frequently have 20 to 30 trade partners nationwide. (Presson Tr. 1569; Perry Tr. 2323; Diforio Tr. 2110; Price Tr. 2208). Weyerhaeuser has 23 exchange agreements. (WX 1131 A-J).

98. Exchange agreements are typically for one-year terms. (CX 651, Stip. 60; Presson Tr. 1572; Price Tr. 2208). Mr. Jack Presson, Weyerhaeuser's Logistics Manager for Containerboard Operations, explained that these contracts are frequently renewed annually because renewal

> provides a level of stability . . . [on the] paper mill side. We can expect to receive the same type of order patterns in the grades and widths that are good for us. From the box plant side, it provides that continuity [27] in terms of their supply sources from one month to the next. . . . So from a routine flow the term contract is better, and just the fundamental nature of the things that make that trade good to begin with are the same kinds of things that make it good the next month and the next month and the next month. (Presson Tr. 1572–73).

99. Although exchange agreements are frequently renewed, each producer must live up to its obligations under the agreement or lose the trade. For instance, Owens-Illinois discontinued an exchange agreement with Weyerhaeuser when its box plants were dissatisfied with the brightness of the color of the liner they were receiving from Weyerhaeuser's Valliant, Oklahoma containerboard complex. (Cassidy Tr. 885; Presson Tr. 1608–09). [***] The record contains other testimony to the effect that exchange agreements will be terminated or not be renewed when there is dissatisfaction with quality or service. (Campbell Tr. 665; Diforio Tr. 2112–13; Presson Tr. 1573–74; Price Tr. 2208–09).

100. Industry witnesses testified uniformly that exchange agreements are viewed as simultaneous buy/sell transactions that differ from open market transactions only in that they involve less cost and less risk of loss. (Cassidy Tr. 790–91; Diforio Tr. 2110–11, 2156 IC; Waechter Tr. 1690). They explained that these buy/sell transactions

are coordinated in order to preserve the advantage of forward integration into box plants and to improve mill scheduling. (Presson Tr. 1570–71; Cassidy Tr. 790–91; Waechter Tr. 1689–90; Perry Tr. 2326).

101. Exchange agreements are similar to open market transactions in the way payments are made. For instance, under Weyerhaeuser's exchange agreement with Owens-Illinois, Owens-Illinois' box plant in Tracy, California receives an invoice from Weyerhaeuser's North Bend mill, which Owens-Illinois pays directly. In turn, Weyerhaeuser's box plant in Rochester, New York receives an invoice from Owens-Illinois' Tomahawk, Wisconsin mill, which is paid by the Weyerhaeuser box plant. In sum, money changes hands as it would in a direct sale or purchase. (Cassidy Tr. 855–56; Johnson Tr. 467–68, 507; Presson Tr. 1569; Diforio Tr. 2110, 2151; Price Tr. 2208). Very few trades are barter arrangements where no money changes hands. (Diforio Tr. 1569; Perry Tr. 2326). [28]

102. Exchange agreements typically are based on prices reported in *Official Board Markets* ("OBM"). OBM is an independent publication that reports prices "as announced to customers by major board producers." (WX 1508 A-H).

103. Industry witnesses testified that OBM prices are used in exchanges primarily to avoid price communications between competing producers. (Wollenberg Tr. 605; Cassidy Tr. 798–99; Presson Tr. 1570; Diforio Tr. 2110; Price Tr. 2208; Perry Tr. 2326).

104. Although a box plant pays the OBM price to the trade partner's mill, it frequently receives an intra-company adjustment or rebate to correspond to its company's then-prevailing internal transfer price. ([***]). This is due to the fact that OBM prices do not always reflect the prevailing market price level in the industry. (Diforio Tr. 2111; Price Tr. 2215 IC; Finding 120 n. 9). Without this adjustment, box plants could not remain competitive and still generate any profit. (Cassidy Tr. 801–02 IC; Perry Tr. 2327).

C. *Open Market Sales*

105. Some companies are committed to being "net sellers" of containerboard, which means that they deliberately produce more containerboard than they consume. Weyerhaeuser has consciously pursued the strategy of being a net seller. (Waechter Tr. 1656–57).

106. Producers can rarely match exactly their production with their consumption. (Waechter Tr. 1653–55). Accordingly, virtually all producers, even if not normally net sellers, occasionally find themselves with some surplus tonnage that they sell on the open market. (Findings 107–108, below).

107. Sales on the open market are also a means of allowing a producer to optimize mill production. For instance, even if a producer

were a net buyer of containerboard, it might choose to sell some tonnage on the open market in order to round out production runs of particular grades or weights that it does not need internally. (Waechter Tr. 1657).

108. A producer may also make sales on the open market even though it could consume all of its production, in order to maintain a position in the open market for times when demand is [29] weak and its containerboard production would otherwise be in excess. (Diforio Tr. 2112; Waechter Tr. 1657, 1698–99).

109. There is competition for open market customers. The evidence in this proceeding revealed that independent (non-integrated) box plants on the west coast have a number of suppliers actually selling to them, and are continuously solicited by still other sources of supply. (Howard Tr. 2066–67 part IC; York Tr. 1932–34 IC; Watts Tr. 2001–02; Aitchinson Tr. 2028–29; JX 5 E-H).

110. Similar conditions of supply prevail for box plants owned by integrated companies that do not produce medium on the west coast. These box plants obtain the containerboard they need through direct shipments from their own eastern mills, exchange agreements, or outright purchases. They are actively solicited by other suppliers. Thus, Mr. Stan Price of Stone Container Corporation testified that his Los Angeles area box plant had an adequate number of suppliers and "in fact, we are turning down approaches by other suppliers." (Price Tr. 2206). Similarly, Mr. Alfred Perry of Continental Forest Industries testified that his Los Angeles area box plant had never had any difficulty obtaining medium over the last "20 years," and that "there is ample medium supply on the west coast." (Perry Tr. 2332).

111. Open market sales represent the smallest portion of medium consumption. (CX 651, Stip. 66). On the west coast, only about 12% of the medium consumed was sold on the open market, with about 24% being utilized by the box plants of eastern producers (primarily through trades) and about 64% being consumed in the box plants of the west coast medium producers. (WX 2015 A).

D. *Distribution Through Brokers*

112. While the bulk of medium distribution is handled directly between producers and consumers, there are brokers in the industry. From the producer's standpoint, brokers are simply another source of customers. [***]

113. Due to their role as resellers in the distribution chain, "brokers receive a commission and usually an adjustment in freight." ([***]). Thus, a broker "gets at [30] least five percent" off the typical market price. ([***]). Once a producer contracts with a broker, the broker is free, of course, to sell the medium any place in the country. ([***]).

114. From the consumer's viewpoint, brokers are another supplier of containerboard. [***]

115. Brokers also may serve as a "competitive sounding board" for customers, enabling them to take advantage of the best supply sources and the best prices. [***] an independent box plant [***] believes that "it is a sound business practice to have a paper merchant [*i.e.*, a broker] who has contacts throughout the United States with all suppliers of containerboard. . . ." ([***]). Similarly, Mr. Perry of Continental Forest testified that brokers would allow his west coast box plant to know whether a "price really is justified." (Perry Tr. 2349–50).

116. The evidence also indicates that brokers are competitive with producers. (WX 1200a part IC; WX 1200m; WX 1200bb part IC; WX 1200uu; WX 1200hhh). [***] explained that the brokers supplying his [***] box plant charged him "a competitive" price. ([***]). And [***] indicated that his broker's "competitiveness" was "equal to everybody else." ([***]). Significantly, [***] indicated that if brokers gave him a more competitive price, all other factors being equal, he would increase his purchases from them. (*Id.* IC). [***] testified that he had no "true preference" and did not "really care" whether he purchases from a producer or a broker. ([***]).

117. Many brokers solicit sales on the west coast. For example, [***], an independent box plant in the [***] area, has contacts with the following brokers: (1) La Boiteaux, (2) American Fibers, (3) The Donohoo Group, (4) Gibson Group, and (5) The Pacific Rim Group. ([***]). [***] uses another broker, George Field. ([***]). **[31]**

VI. PRICE STRUCTURE

A. *Delivered Pricing*

118. Medium is generally sold on a delivered price basis. (CX 651, Stip. 55). The prevalence of delivered pricing is the result of customer preference. (Waechter Tr. 1700; Aitchinson Tr. 2070; Howard Tr. 2084; Diforio Tr. 2130; Perry Tr. 2333).

119. Although some medium producers on the west coast and elsewhere may sell at uniform delivered prices (Wollenberg Tr. 590), this does not appear to be a universal practice within the industry. There is evidence that in both the east and the west different prices are charged to different customers from time to time and that prices often vary between competing mills. (Johnson Tr. 503 IC; Cassidy Tr. 801 IC; Locke Tr. 985 IC; York Tr. 1934 IC; Watts Tr. 1983 IC; Aitchinson Tr. 2023 IC, 2048 IC; Howard Tr. 2065 IC; Diforio Tr. 2167–68 IC; Perry Tr. 2351 IC; WX 1200a part IC; WX 1200b part IC; WX 1200 m;

WX 1200u; WX 1200bb part IC; WX 1200cc; WX 1200uu; WX 1200 hhh).[8] [***]

B. *OBM Prices*

120. OBM prices, which the record indicates are based upon sellers' prices taken from a survey of medium and liner customers (Wollenberg Tr. 590–91; Campbell Tr. 662; Cassidy Tr. 801 IC), are generally an accurate reflection of the market price, except during recessionary periods such as that beginning [32] in late 1981. (Waechter, CX 64Z63; Presson, CX 65Z39–Z40; Johnson Tr. 463–64, 505; Wollenberg Tr. 590–92; Campbell Tr. 666; Cassidy Tr. 803–04; *but compare* CX 709 with WX 1200a part IC, WX 1200b part IC, WX 1200h, WX 1200m, WX 1200u, WX 1200 aaa and WX 1200hhh). Further, exchange agreements, which represent the vast majority of external medium transfers on the west coast (WX 2015 A; CX 704) are virtually all transacted at OBM prices. (Johnson Tr. 467; Campbell Tr. 662; Cassidy Tr. 798–99; Presson Tr. 1570, 1613; Diforio Tr. 2110, 2151, 2154–56 IC; Price Tr. 2208, 2227 IC, 2234; Perry Tr. 2326; Brown Tr. 2518; CX 24A-Z50; CX 48Z44, Z48–Z49; CX 51Z2–Z4; CX 52A; CX 189A-Y IC; WX 1114 through WX 1130 all IC). Thus, other than for intra-company transfers that have only an arbitrary transfer price, domestic medium transactions tend to be made at or near OBM reported prices. It is, therefore, reasonable to look at these prices as representative of the general level and movement of prices in the overall market, at least insofar as a comparison of prices on the west coast with those in other sections of the country is concerned.[9]

C. *The East-West Differential*

121. A review of OBM prices on a nationwide basis, during the period 1973 through 1981, reveals a very close relationship between medium and liner prices and between containerboard prices on the west coast and those in the rest of the nation (herein generally referred to collectively as the east). (CX 709A-Z2). In fact, during most of this period the price differential between west coast prices and eastern prices (the E-W Differential) was only $4.25 for medium (the west coast price being the higher), with linerboard prices being identi-

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[8] When comparing prices charged to various independent box shops, as reported on their subpoena returns—WX 1200a, b, h, m, t, u, bb part IC, cc, uu, aaa and hhh—it should be noted that some companies report their costs on the basis of thousand square feet or square feet. These can be converted to a dollar per ton basis by using the following formula:

$$\$/\text{ton} = \frac{\text{MSF price}}{\frac{1}{2}\text{ basis weight}} \times 1000$$

The basis weight is the 26 pound, 32 pound, etc., basis weight of the medium.

[9] It is clear from the evidence that OBM does not always pick up all transaction prices available in a particular area. (Johnson Tr. 463–64, 505; Wollenberg Tr. 590–92; Campbell Tr. 666; Cassidy Tr. 803–04; Perry Tr. 2350 IC). It also appears that various mills do not always exactly parallel OBM prices, even in their list prices. (Wollenberg Tr. 590–92; WX 1333 part IC). Thus, as an indication of specific prices by specific mills, OBM prices are less reliable.

cal in both areas. (*See* CX 709, attached hereto as Appendix I). In April 1980, this differential was widened to $34.25 for medium and $30.00 for liner. (CX 709W). Evidence of record indicates that this increase was due initially to shorter supplies and [33] higher prices for wood chips in the west which reflected a temporary surge in chip exports from the west coast which began in 1979 and accelerated in 1980. (Countryman Tr. 1070; Brown Tr. 2510; CX 30; CX 623C; *See also* CX 942 and CX 960). Later, and more importantly, there was a substantial downturn in the housing and lumber markets due to the recession, which decreased the supply and increased the prices of residual wood chips on the west coast. (Wollenberg Tr. 595–97; Countryman Tr. 1070, 1098; Brown Tr. 2510; Presson, CX 65Z31–Z32; CX 20C; CX 131F; CX 132B; CX 217A; CX 154C).

122. The lock-step pricing of medium and liner between the west and the east during the ten year period 1973–1982[10] has been remarkable, with prices rising and falling together throughout this entire period, except in 1980 when the west coast suffered disproportionate cost increases and the E-W Differential was increased by $30.00. (Finding 121; *See also,* CRB 1–4).

123. The price differential of $4.25 did not even closely approximate the transportation cost involved in shipments by eastern mills to the west coast. (WX 1159 K-L IC; WX 1200c-D; WX 1200j-D IC; WX 1200o-H IC; WX 1200p-I IC; WX 1200ii-H-I; WX 1200jj-D; WX 1200tt-L; WX 1200ww-G IC; WX 1200xx-D IC; WX 1200eee-H IC; WX 1200ppp-J IC). In fact, complaint counsel admit that, overall, the equilibrium transportation cost difference has not yet been equalled by the E-W Differential, even during that period when it was at $34.25. (Oral Argument Tr. 8–9).[11] [34]

VII. WEST COAST PRODUCTION AND CONSUMPTION OF CONTAINERBOARD

124. As noted above, there are 13 medium mills on the west coast (the 11 state area designated as the relevant market in the complaint). These are operated by 11 companies (Finding 48), with Weyerhaeuser

[10] Even during 1982 the OBM prices are an accurate reflection of price differences between the east and the west coast, since respondent admits that the E-W Differential was approximately the same ($30–$35) on a transaction price basis as on the basis of OBM prices during this time. (Oral Argument Tr. 43; WX 1333 K-L IC).

[11] The evidence indicates that the $34.25 differential was a temporary aberration caused primarily by the housing slump and that the differential was greatly reduced in the spring of 1983, when the eastern prices were increased without a corresponding increase in the west coast prices. This reduced the E-W Differential to $10–14 from the $30–35 range which persisted through 1982. (Diforio Tr. 2135 IC, 2174; Price Tr. 2217 IC, 2226 IC; Perry Tr. 2351 IC, 2375; Brown Tr. 2496 IC, 2509–10). Eastern firms had previously attempted to raise their prices, so as to match the old differential of $4.25, in May 1980 and January 1981, but without lasting success. (CX 709W & Z). Respondent urges, with some evidential support, that the E-W Differential will never go back to the pre-1980 level and will continue to widen, due to an ever-widening cost gap between mills on the west coast and those in the southeastern portion of the country. (Clephane Tr. 2610–11, 2612; Brown Tr. 2470–72, 2476 IC). Thus, the increase in the E-W Differential may also represent a natural re-alignment of prices to reflect the growing differences in costs between west and east. In any event, it doesn't appear from the record that the equilibrium transportation cost difference will be equalled in the near future by the E-W Differential, barring a renewal of the deep recession in the housing industry which occurred in 1981 and 1982.

and Willamette (Western Kraft) each operating two medium mills. (WX 1354A). Both of Weyerhaeuser's mills are semichemical mills, whereas Willamette operates a recycled medium mill in Port Hueneme, California and a semichemical medium mill in Albany, Oregon. (WX 1354A part IC).

125. There are also 13 linerboard mills on the west coast. (WX 1356A). Again the 13 mills are operated by 11 companies. In this instance though, it is Container Corporation of America and Crown Zellerbach that each operate two mills. Both of Container Corporations' mills are recycled mills and Crown Zellerbach operates one kraft liner mill and one recycled mill. All of the other west coast liner mills are kraft mills. (WX 1356A). [35]

126. Seven companies produce both medium and linerboard on the west coast and also have box shops located there. They are:

(a) Container Corp. has a complex in Los Angeles, California which produces recycled medium and recycled liner. It also has a recycled liner mill in Tacoma, Washington. It operates 5 box shops on the west coast; 4 in California and 1 in Oregon. (WX 1301d-A; WX 1354A part IC; WX 1356A).

(b) Crown Zellerbach has a mill at Antioch, California which produces both recycled medium and recycled liner. This mill is a "swing mill" in that it can produce either medium or liner on the same machinery. It also operates a kraft liner mill at Port Townsend, Washington. Crown Zellerbach operates 2 box shops in California. (WX 1301f-A; WX 1354A part IC; WX 1356A; CX 316B).

(c) Georgia Pacific produces semichemical medium and kraft liner at its mill complex at Toledo, Oregon. It also operates 5 box shops on the west coast; 4 in California and 1 in Washington. (WX 1301g-A; WX 1354A part IC; WX 1356A).

(d) Longview Fibre has a mill complex at Longview, Washington which produces both semichemical medium and kraft liner. This is a "swing mill" in that some of its machines are used for both medium and liner at various times. It operates 6 box shops in the west; 2 in California, 3 in Washington, and 1 in Idaho. (WX 1301j-A; WX 1354A part IC; WX 1356A; Wollenberg Tr. 535).

(e) Louisiana Pacific operates a mill complex at Antioch, California which produces both semichemical medium and kraft liner. It operates 2 box shops; 1 in California and 1 in Arizona. (WX 1301k-A; WX 1354A part IC; WX 1356A).

(f) Respondent Weyerhaeuser produces semichemical medium at mills in Longview, Washington and North Bend, Oregon (the acquired mill) and kraft liner at a mill in Springfield, Oregon. As previously

noted, it has 9 box shops on the west coast; 6 in California, 1 in Oregon and 2 in Washington. (WX 1301t-A; WX 1354A part IC; WX 1356A).

(g) Willamette (Western Kraft) has a recycled swing mill in Port Hueneme, California which can produce either recycled medium or recycled liner. (WX 1200111–T). In 1982 this mill was used primarily to produce medium. (WX 1200111–U, W). It also has a mill complex at Albany, Oregon, which produces both semichemical medium and kraft liner. It operates 7 box shops on the west coast; 4 in California, 1 in Oregon and 2 in Washington. (WX 1301u-A; WX 1354A part IC; WX 1356A). [36]

127. Four companies operate medium mills on the west coast, but do not have linerboard mills there.

(a) Inland Container has a recycled medium mill at Santa Clara, California. It also operates 3 box shops on the west coast, all in California. (WX 1301h-A; WX 1354A part IC).

(b) Newark Boxboard Co., through its subsidiary California Paperboard Corporation, operates a recycled medium mill at Santa Clara, California. (WX 1354A part IC). This is the only medium producer on the west coast that has no box shops there. (WX 1737B IC).

(c) Specialty Paper Mills has a recycled medium mill at Santa Fe Springs, California. It apparently has 2 box shops on the west coast, but the locations are not revealed by the record. (WX 1354A part IC; WX 1737B part IC; CF 2–48; RF 136).

(d) Boise Cascade has a semichemical medium mill at Wallula, Washington. It also operates 7 box shops in the west; 2 in California, 1 in Oregon, 1 in Washington, 2 in Idaho and 1 in Colorado. (WX 1301b-A; WX 1354A part IC).

128. Four companies operate linerboard mills on the west coast, but produce no medium there.

(a) Champion International operates a kraft liner mill in Missoula, Montana. It has no medium mill on the west coast, but operates a semichemical medium mill at Ontonagon, Michigan and a recycled medium mill at St. Paul, Minnesota (this latter mill was converted from semichemical to recycled in 1980). It operates 4 box shops in the west; 3 in California and 1 in Colorado. (WX 1301c-A; WX 1200j-B,E; WX 1354A part IC; WX 1356A).

(b) International Paper Company operates a kraft liner mill at Gardiner, Oregon. It operates no medium mill in the west, but does produce semichemical medium in the southeast at its mill complex in Mansfield, Louisiana. It has 4 box shops on the west coast, all in California. (WX 1301i-A; WX 1356A; WX 1200jj-B).

(c) St. Regis has a kraft liner mill in Tacoma, Washington. It has no medium mill on the west coast, but has two recycled medium mills

in the east. It has no box shops on the west coast. (WX 1356A; WX 1200zz-C, I; WX 1305A-D). [37]

(d) Southwest Forest Industries, Inc., has a kraft liner mill at Snowflake, Arizona. It has no medium mill in the west or the east. It operates 2 box shops in the west; 1 in Arizona and 1 in California. (CX 1301q; WX 1356A).

129. Five integrated companies have neither medium nor liner mills in the west, but operate box shops there.

(a) Continental Forest Industries which has a semichemical medium mill in Louisiana, but none in the west, operates 1 box shop in California. (WX 1301e-A).

(b) Owens-Illinois which has two semichemical medium mills in the east, but none in the west, operates 3 box shops in California. (WX 1301o-A).

(c) Packaging Corporation of America has a semichemical medium mill in Michigan, but no medium production in the west. It has 2 western box shops; 1 in Colorado and 1 in Utah. (WX 1301p-A).

(d) Stone Container Corp. has a semichemical medium mill in Ohio, but no such facilities in the west. It operates 2 western box shops; 1 in California and 1 in Arizona. (WX 1301r).

(e) Union Camp Corp. has no medium plants in the United States. It operates 1 western box plant, in Colorado. (WX 1200 iii; WX 1305B).

130. There were approximately 12 independent box shops in the west, including Abbey Corrugated which is now bankrupt and out of business. (WX 1305A-C; Watts Tr. 1971 *et seq.;* Oral Argument Tr. 53). Most of these are located in the State of California. (WX 1305A-B; Watts Tr. 1971 *et seq.*)

131. Thus, out of approximately 80 box shops in the west coast area, 49 are owned by 10 integrated west coast medium producers, 19 are owned by other integrated producers of medium and/or liner who do not have medium mills in the west, and only about 11 or 12 are operated by non-integrated, "independent," [38] manufacturers.[12] (Findings 126–130). As a result, as previously noted, open market sales represent the smallest portion of west coast medium consumption. Only about 12% of such consumption is accounted for by open market sales. About 24% is utilized by the box plants of the integrated companies with no western medium mills and the remaining 64% is consumed internally in the box plants of the western medium producers. (Finding 111; WX 2015A).

132. Although most of this medium is supplied to the box shops by medium producers, through internal transfers, exchanges, or open

[12] The "independent" box plants considered herein do not include "sheet plants." "Sheet plants" are small operations which also produce boxes, but which do not have their own corrugaters. They must purchase corrugated sheets from other box shops. Therefore, they do not purchase medium or liner as a separate product. (CX 109Z–9).

market sales, the box shops also can turn to brokers for some of their medium supplies. At least 7 of the independent box shops and some of the integrated companies have purchased a portion of their medium needs through a number of brokers who operate in the west coast area. (WX 1200a part IC, m, t part IC, u, bb part IC, uu, aaa, hhh; Perry Tr. 2349–50, 2328–29 IC).

VIII. WEST COAST MEDIUM SUPPLY

A. *Shipments From The East*

133. Shipments from eastern mills to the west coast are a small but apparently growing portion of the west coast medium supply. Such shipments are not limited to only those companies having box shops in the west. (CX 953A). Of the 21 eastern mills which shipped medium to the west coast during the six-year period 1977–1982, 6 of the mills had no proprietary relationship with a west coast box shop at the time. (CX 953A). Eight of the mills were owned by companies having box shops in the west, but no medium production facilities there (CX 953A), and seven were operated by companies which had west coast medium mills and box shops but still received shipments of medium at their west [**39**] coast box shops from medium mills they owned in the east. (CX 953A).[13]

134. There have also been medium shipments into the west coast area through brokers, and at least one Canadian medium producer. (*See, e.g.*, WX 1200 qqq IC; York Tr. 1932–34 IC; Findings 113–117, 132). Such shipments cannot be quantified precisely, since exact information as to the volume of these shipments is available from only one broker, La Boiteaux, and that is only available for the years 1980–1982. (WX 1200 qqq IC). As to the other brokers and Belkin Paperboard of Canada, there is only testimony from some of the companies who purchased from these sources (Findings 113–117; York Tr. 1932–34 IC), and the returns of several of the independent box shops who were subpoenaed by respondent and who volunteered information as to the identity of their suppliers. (WX 1200 a part IC, m, t part IC, u, bb part IC, uu, aaa, hhh).

135. For as far back as there is evidence of record, shipments of medium and liner have been made from eastern mills to the west coast. Mr. Alfred Perry of Continental Forest Industries testified that his company has shipped medium to its Los Angeles box plant for "probably 20" years. (Perry Tr. 2334). During the period 1977–1982, 16 different companies have shipped medium to the west coast from 21 different eastern mills. (CX 953A; Finding 133).

[13] In these last seven, I have not counted Menasha's shipments from its Otsego, Michigan mill in 1977, when it still owned the North Bend mill and the Anaheim box shop. (CX 953A).

136. Despite the fact that until 1980 the E-W Differential was only $4.25, the record evidence indicates that such shipments have been profitable ones. (Kamerschen Tr. 1478; Cassidy Tr. 861, 865–67; Locke Tr. 986–87 IC; Price Tr. 2215 IC, 2217–19 IC; Perry Tr. 2335–36 IC; WX 1159L IC).[14] Additionally, the evidence indicates that eastern mills selling in the open market on the west coast did so at competitive prices and on competitive service terms. (York, Tr. 1933–35 IC; Watts Tr. 2017; Aitchinson Tr. 2029; Howard Tr. 2068; Diforio [40] Tr. 2122 IC, 2132–33; Perry Tr. 2330 IC; WX 1200a part IC, b part IC, m, t part IC, u, bb part IC, uu, aaa, hhh; *See, e.g.,* WX 1200u-R).

137. Complaint counsel's tabulation, based upon subpoena returns for the years 1977–1981 and the returns to respondent's subpoenas for the year 1982, reveal that from 1977 through 1982 the following percentages of medium consumed in the west were provided by eastern mills:

1977 – 5.9%
1978 – 8.8%
1979 – 6.9%
1980 – 5.5%
1981 – 7.6%
1982 – 9.6%

(CX 953A)

These figures omit all imports through brokers and Canadian producers since such data were not available. [***]

138. The years 1978 and 1979 were atypical years, since there were a series of strikes at containerboard mills on the west coast during these years, which necessitated shipments from the east to meet the demands of the western box shops. (Cassidy Tr. 859; Perry Tr. 2335; Brown Tr. 2488; Brozen Tr. 2867–68; CX 307A; CX 313D; CX 325D; CX 334D; CX 335D; CX 170H; CX 953A). Taking this into consideration, there has been a steady increase in shipments over this period, despite the fact that the recent recession caused a substantial drop in medium consumption in both the east and the west beginning in the fourth quarter of 1981 and extending through 1982. (CX 639; CX 648; CX 155B-C; CX 156D; CX 157A-D; CX 158D; CX 163G, O IC; Wollenberg Tr. 588–89).

139. However, as the above figures show, the imports of medium into the west coast area have probably not exceeded 10% of the west coast medium supply over the past six year period. (Finding 137).

[14] There is evidence that, at least for some companies at some times; the E-W Differential on a *transaction* level basis was somewhat higher than $4.25 during this earlier period. (*See, e.g.,* CX 719, regarding Menasha).

140. Given the basic characteristics of this industry, especially the importance of exchange agreements in effecting the supply of the vast majority of the box shops, *i.e.*, those operated by integrated companies, this low percentage of imports is not surprising. [41]

B. *Factors Affecting Shipments*

141. In the first place, it must be remembered that the open market (the independent box shops) represent only about 12% of the total medium consumption on the west coast. (Finding 131). Adding in the box shops of integrated companies having no medium plant in the west, only raises that portion of the market open to imports to about 36%. (Finding 131). The remainder of the west coast medium consumption takes place in the captive market operated by the west coast medium producers. (Finding 131). The real market for eastern imports is, therefore, quite a bit smaller than the total west coast medium consumption.

142. The practice of exchange agreements, by which this industry operates, narrows this available market even more. The exchange agreements between the eastern producers with western box shops and the western medium producers act as a surrogate for shipments from eastern mills to those western box shops. The evidence indicates that these eastern producers are quite supportive of their western box shops and would not allow them to curtail production because of a shortage of west coast medium to meet their needs. (Cassidy Tr. 859, 866–67; Diforio Tr. 2127–28; Price Tr. 2221; Perry Tr. 2340–41 IC; Brown Tr. 2498). In 1978 and 1979, when west coast medium production was curtailed due to a series of strikes (Finding 138), these eastern companies substantially increased their shipments to the west coast to keep their west coast box shops adequately supplied. (CX 953A; Cassidy Tr. 859; Perry Tr. 2335; Brown Tr. 2488; CX 307A; CX 313D; CX 325D; CX 334D; CX 335D; CX 170H). In fact, at least one company shipped "close to 100 percent" of its box shop needs to the west coast during the strike period. (Perry 2335). At that time the E-W Differential was only $4.25. (CX 709Q-V).

143. Under normal conditions, however, with an adequate supply of medium available for their west coast box shops, it makes little sense for these eastern mills to supply all of the medium needs of their west coast box shops, when exchange agreements can allow them to make more profitable sales closer to their eastern mills. Thus, one producer testified that although he would have realized a profit on shipments to the west coast in the 1981–1982 period when the E-W Differential was $34.25, he was realizing a greater profit on his eastern sales to Weyerhaeuser under his exchange agreement and, therefore, it made no sense for him to break his trade agreement with Weyerhaeuser

just to ship additional product west, since this [42] would displace Weyerhaeuser sales to him in the west and cause Weyerhaeuser to take less from him in the east. ([***]).

144. Although the existence of these exchange agreements does tend to curtail shipments to the west under these circumstances, they cannot be considered a barrier to entry, nor would they limit such shipments in the event the western mills did anything to abrogate the agreements, such as reducing the supply of medium to the west coast box shops of these eastern companies. (Cassidy Tr. 866–67; Diforio Tr. 2127–28; Price Tr. 2221; Perry Tr. 2335, 2340–41 IC; Brown Tr. 2498; Finding 142).

145. This is so because the entire exchange or trade procedure is based upon the mutual satisfaction of the trade partners. (Findings 99–100). If the western partners should do anything to abrogate agreements with eastern mills owning western box shops they would not only jeopardize their own supply in the east, but they would also force such eastern trade partners to ship more medium west to their own box shops so that those box shops would be adequately supplied. (Cassidy Tr. 866–67; Diforio Tr. 2127–28; Price Tr. 2221; Perry Tr. 2326, 2335, 2340–41 IC; Brown Tr. 2498).[15] As Mr. Perry of Continental Forest Industries explained it, the system of exchanges gives his company "clout" with his trading partners.

> Longview or Weyerhaeuser on the west coast cannot do anything to my box plant without having a similar effect on their plants in the east. (Perry Tr. 2326).

146. This fact becomes even more apparent when it is noted that two of these eastern medium producers are among the largest liner producers on the west coast. Champion International which operates 4 box shops in the west, but produces medium only in the east, is the largest producer of linerboard on the west coast. (Finding 128a; WX 1356A). International Paper also has 4 box shops in the west, but produces medium only in the east. (Finding 128b). Its western liner facility ranked 4th on the west coast in terms of production in 1981. (WX 1356A). When it is considered that a corrugated board contains 2 sheets of [43] linerboard for each sheet of corrugating medium, it is clear that these two large integrated companies have an important stake in keeping their west coast box plants operating at full capacity. Since they have already demonstrated their ability to ship more medium west during shortages of supply, during the 1978–1979 strike period, it is clear that they would do so again if the west coast medium supply were curtained through collusion. (Findings 138, 142; CX 953A; Diforio Tr. 2127–28; Brown Tr. 2488–89 IC, 2498).

[15] As noted in Findings 138 and 142, they did so during the strike period in 1978 and 1979.

147. This is not to say, of course, that other eastern medium producers are not interested in ensuring an adequate medium supply to their west coast box shops. The evidence indicates that Owens-Illinois, Stone Container Corp., Packaging Corporation of America and Continental Forest are equally determined to keep their west coast box shops operating at maximum capacity. (Findings 138, 142; CX 953A). However, Champion International and International Paper obviously have extra incentives to keep their western box shops adequately supplied, in view of their substantial investment in linerboard facilities on the west coast.

148. Morever, these and other eastern medium producers have in the past generally shipped medium west for sale on the open market (CX 953A; WX 1200a part IC, m, t part IC, u, bb part IC, uu, aaa, hhh; JX 5F-H; Diforio Tr. 2121; Countryman Tr. 1095; York Tr. 1959–60 IC; Watts 2001–03, 2013, 2017; Aitchinson Tr. 2024 IC, 2029; Howard Tr. 2065 IC, 2068; Lorenz Tr. 2381 IC) and such sales have been profitable ones. (Finding 136). These sales have been increasing in recent years, particularly since the increase in the E-W Differential. (CX 953A; Finding 137). The evidence also reveals that the eastern mills have been in the market soliciting additional sales. (York Tr. 1932–34 IC; Watts Tr. 2001–02; Aitchinson Tr. 2024–26 IC, 2029; Howard Tr. 2066–67 IC; Brundage, JX 5F-H; Price Tr. 2232; Brown Tr. 2490).

149. Although such sales have not represented more than 10% of west coast consumption in the past (Finding 137), the record indicates that if west coast medium producers were not adequately supplying the west coast box shops, these and other eastern mills would undoubtedly take up the slack. (WX 1732A; Locke Tr. 987 IC; Diforio Tr. 2117 IC; Price Tr. 2232; Perry Tr. 2384 IC, 2387; Brown Tr. 2490).

150. The evidence further indicates that there is enough capacity available for eastern mills to ship additional medium to the west coast, even in normal, non-recessionary times. (CX [44] 3D; CX 7D). Historically, the supply of containerboard has kept pace with and anticipated growth in demand. (Countryman Tr. 1098). In 1970 the total medium produced in this country for domestic use amounted to 4,264,000 tons. By 1981 this production had increased to 5,702,100 tons, despite the recession which began in the last quarter of 1981. (WX 1338g). As explained by Mr. Brown of International Paper "the industry has been characterized by over-capacity . . . since the late 60's." (Brown Tr. 2485). This is also revealed by the returns of the various medium producers to complaint counsel's subpoenas, which reveal an ever-increasing capacity for medium production. (CX 307E, H; CX 312G, J; CX 313D; CX 315C; CX 321F; CX 324G, J; CX 325D-F; CX 330G; CX 331D; CX 334D; CX 335D; CX 337G; CX 338D; CX 341D; CX 348G). Such increases in capacity are being accomplished through:

new mills, primarily in the southeast portion of the country (Johnson Tr. 493–94; Locke Tr. 909; Brown Tr. 2453–54); debottlenecking, that is, making improvements at a point in the production process that is effectively restraining the entire operation's capacity (Johnson Tr. 481–82; Justus Tr. 2278; Perry Tr. 2314; Brown Tr. 2459; Cassidy Tr. 887 IC); upgrading existing facilities (Cassidy Tr. 871 IC, 885–87 IC; Countryman Tr. 1095–96; Waechter Tr. 1642–43, 1735–36; Diforio Tr. 2116 IC; Price Tr. 2193–94 IC; CX 703B; CX 348L; WX 1200 pC,E IC; WX 1200 eeC; WX 1200 jjC; WX 1200 ttk; WX 1200 vvH; WX 1200 pppO; WX 1329G; WX 1336E); increased use of recycled fiber (Justus Tr. 2284; Cassidy Tr. 888; Locke Tr. 933–34; Brown Tr. 2459); and other means (Justus Tr. 2266–67). Mr. Justus of Beloit Corporation, which manufactures machinery and provides technical services for the paper industry, testified that production increases of 25 to 30 percent are possible at most existing mills, particularly any mill "that is seven or eight years old", at a relatively modest expense. (Justus Tr. 2278, 2286).

151. Under these circumstances, west coast medium mills can practicably control medium supply only to their own box shops. An artificial curtailment of supplies to the box shops of other integrated companies and the independents would draw in additional supplies from outside the western states to meet whatever demand existed in the market for corrugated boxes. (Findings 141–150).[16] [45]

C. *The Relationship With Liner*

152. As previously noted, the production and consumption of medium is intimately connected with the production and consumption of liner. It takes two sheets of liner for each sheet of corrugating medium to make corrugated board. (Findings, 23, 146). Therefore, any curtailment of medium consumption entails a correspondingly larger curtailment of liner consumption—domestic medium consumption is approximately 45% of domestic liner consumption. (Calculated from CX 622D).

153. Since liner is readily exchangeable for medium (Findings 90–91), it would be necessary for any colluders in the medium industry to control supply in the liner industry, if they hoped to curtail medium production and consumption. Yet, four of the eleven liner producers on the west coast are not producers of medium there, and two of these, Champion International and International Paper have been

[16] The production curtailments in 1974–1975 and 1981–1982 do not contradict such finding, since these were recessionary periods when the demand for corrugated boxes and, consequently, medium and liner, was greatly reduced. (CX 622D, J and L; CX 155–157). Therefore, the west coast box shops still had an adequate supply of medium to meet their needs. (Diforio Tr. 2117 IC; Perry Tr. 2356 IC, 2384 IC, 2387; Brown Tr. 2490). In fact, cutbacks in medium and liner production occurred on a nationwide basis during these periods and, at least in 1974–1975, were less severe in the west than in the east. (CX 622D, J, L; CX 155; CX 156; CX 157; CX 714; CX 718).

among the top 4 liner producers on the west coast in recent years. (Findings 128, 146). These latter two companies are also large medium producers in the east, who can readily supply their own western box shops if the need arises. (Findings 128, 146). In any event, the 4 companies producing liner but not medium in the west certainly have no economic incentive to join in any collusion to curtail medium production on the west coast. Furthermore, at least two companies which produce both medium and liner on the west coast (Crown Zellerbach and Longview Fibre) are proportionally far heavier in liner production than in medium production. (WX 1354A; WX 1356A). Also, both of these companies operate "swing mills" which can easily shift [**46**] some of their production from liner to medium on short notice. (Finding 82). Thus, they too would have little incentive to join in any collusion of medium suppliers.

154. Moreover, since most of the top producers of medium on the west coast are also producers of liner on the west coast (WX 1354A part IC; WX 1356A), they would suffer significant losses from their liner business in the event of a curtailment in medium production and consumption. Not only would there be less demand for liner as medium production and consumption was reduced (Kamerschen Tr. 1442; Brozen Tr. 2777; Waechter Tr. 1722–23), but there would be additional losses for some of these integrated companies in connection with their timber and sawmill operations (Waechter Tr. 1636–37) and in the nature of the cost of shared facilities where the companies operate mill complexes. (Wollenberg Tr. 618; Campbell Tr. 711; Locke Tr. 979–80; Countryman Tr. 1107; Waechter Tr. 1625–27; Brown Tr. 2457 IC).

IX. THE RELEVANT MARKET

A. *The Product Market*

155. Despite the close, "complementary" relationship between corrugating medium and linerboard (Kamerschen Tr. 1442; Brozen Tr. 2777) I find the relevant product market within which to judge this acquisition to be corrugating medium. There are a number of characteristics of this product which indicate that it is a separate product market from the production and sale of linerboard. (Findings 156–167, below).

156. Notwithstanding the fact that medium and liner are readily tradeable for each other, they are otherwise quite dissimilar. Medium is the only product that economically meets the characteristics for the fluted material in corrugated board. (CX 651, Stip. 49). Medium is designed for characteristics that cannot be obtained from linerboard or other products. (Findings 26–30). As Mr. Wollenberg of Longview

Fibre explained, liner and medium are not used interchangeably in the production of corrugated containers because "they have different structural functions." (Wollenberg Tr. 534; *See also,* CX 651, Stip. 50; Campbell Tr. 658; Cassidy Tr. 782; Hudson, JX 8N-O). Nor are any of the wide array of other paper products produced by these paper-products companies used interchangeably with medium. (Wollenberg Tr. 576). [47]

157. Similarly, medium lacks the characteristics necessary for use as the linerboard portions of corrugated containers. (Cassidy Tr. 781, 783; Wollenberg Tr. 533–34, 586).

158. Thus, there exists no actual or potential demand-side substitutes for corrugating medium. (Findings 156–157).

159. The record also establishes that actual and potential supply-side flexibility between facilities producing corrugating medium and facilities producing liner and other paper products is extremely limited. (Kamerschen Tr. 1244–46). Because of its particularized functional requirements, corrugating medium is made by a unique production process using specialized facilities, and is not made from the pulp used to produce kraft linerboard or other paper products. (Campbell Tr. 650–51; Wollenberg Tr. 536; Justus Tr. 2289–90; Cassidy Tr. 763).

160. In particular, there are a number of significant differences between the pulp and the pulping equipment used to make semichemical medium and the pulp and pulping equipment used to make kraft linerboard, which make it unlikely that corrugating medium and kraft liner could be made interchangeably at either type of facility without substantial modifications to the facilities. First, due to the differing functional properties of medium and linerboard (Findings 26–30), semichemical medium pulp consists predominantly of short wood fibers (Finding 33), while kraft linerboard pulp consists of long wood fibers. (Findings 70, 72). Second, the digesters used to produce kraft pulp for linerboard are different from the digesters used to produce semichemical pulp, and they are not used interchangeably. (Wollenberg Tr. 549; Justus Tr. 2269, 2291). Third, since the semichemical medium and kraft liner pulping processes use entirely different chemicals in the cooking process (CX 186V; Campbell Tr. 651; Wollenberg Tr. 547) and since kraft pulping is a "full chemical" process (*i.e.,* the lignin is fully dissolved by chemical means without further refining) while medium pulping combines chemical pulping with mechanical refining (Johnson Tr. 420), the two chemical pulping processes cannot be interchanged with each other. Fourth, since a larger and more sophisticated chemical recovery system is required in kraft liner mills than in semichemical medium mills, because sulfur is used in the kraft process (Cassidy Tr. 763; Cambpell Tr. 649), semichemical medium mills would be unable to produce kraft liner

without adding extensive new equipment. (Johnson, CX 63A49–Z50 IC).

161. Apart from the physical differences between semichemical medium and kraft linerboard pulp and pulping [48] equipment, the use of linerboard pulp to produce medium would entail significant economic penalties. (Wollenberg Tr. 552–53). To begin with, softwood chips used to produce liner generally are more expensive than the hardwood chips typically used to produce medium. (Wollenberg Tr. 570; CX 4A; CX 128I). In addition, the kraft process used for linerboard cooks to a significantly lower yield (about 50%) than the semichemical process used for corrugating medium (which yields about 70% or higher). (Campbell Tr. 649; Cassidy Tr. 765; CX 29B, D; CX 109Z175, Z177; CX 186V; CX 190Z7, Z14). Thus, semichemical pulp is significantly less expensive to produce than kraft pulp—40% less costly at Owens-Illinois, for example (Cassidy Tr. 766, 769; *See also,* Wollenberg Tr. 548, 570)—so that it would not be economical to use linerboard pulp to produce medium even if it were possible to obtain the desired functional properties. (Cassidy Tr. 764; Wollenberg Tr. 549; Locke Tr. 937; CX 435A IC).

162. There are also significant differences between many of the paper machines used to produce liner and the paper machines used to produce medium, so that the degree of practical interchangeability between the two types of machines is quite limited. (*See* Countryman, Tr. 1045–46). First, liner machines typically have a secondary headbox that medium machines do not have, which is used to lay down a finer or colored layer of fiber that gives liner the desired surface characteristics. (Wollenberg Tr. 551–52; Cassidy Tr. 758–59; Countryman Tr. 1046–47). The lack of a secondary headbox means that medium machines could not be effectively used to produce liner. (*See* Brozen Tr. 2784–85). Second, the forming sections on liner and medium machines generally differ due to the different drainage characteristics and desired functional properties of the two types of board. (Wollenberg Tr. 552–53; Campbell Tr. 651). Thus, Weyerhaeuser found that attempting to run hardwood pulp on a machine designed for liner production resulted in "poor machine runnability" and an overload in the machine drive due to poor drainage and increased drag. (CX 109Z202). Third, because a medium sheet is more tender than a liner sheet, medium machines tend to have more felts in the pressing section and smaller open draws between the presses. (Cassidy Tr. 759). In addition, since high load pressing destroys the porosity of the medium sheet, making it form poorly on the corrugator, medium machines tend to have lower pressing loads than liner machines. (Countryman Tr. 1048–49). Finally, because liner generally is made in heavier weights than medium, liner machines typically have

more dryers than medium machines, which could not be used when producing medium without overdrying the sheet and [49] destroying its quality. (Countryman Tr. 1049–50; Wollenberg Tr. 552).

163. Due to these substantial differences between liner and medium machines, the record indicates that only a few machines, which apparently have been designed with flexibility in mind and with certain compromises accepted, are able to economically produce both liner and medium. (Wollenberg Tr. 551, 554–55, 558; Justus Tr. 2287; CX 316B; CX 348H; WX 1200 pppQ IC). Thus, the degree of interchangeability between liner and medium machines generally is quite limited. This, combined with the major differences between the pulp and pulping processes for kraft liner and semichemical medium, make it improbable that a kraft liner or semichemical mill will switch from one product to another, unless the mill initially was designed for redundant capabilities.

164. While the degree of interchangeability between kraft liner and semichemical medium mills is highly limited, there is some indication that mills that produce linerboard from recycled materials may also be able to make recycled medium. (Justus Tr. 2287–88; CX 316B; CX 348H; WX 1200 pppQ). However, recycled linerboard accounts for less than 2.5% of total linerboard production. (Finding 73, n. 7). Accordingly, even assuming that such flexibility exists, it would be inappropriate to include *all* linerboard production within the same relevant product market as medium. (Kamerschen Tr. 1246).

165. Thus, the record is clear that supply-side flexibility between corrugating medium and liner or other paper products is minimal. (Kamerschen Tr. 1244–46). Accordingly, it must be concluded that any actual or potential supply-side substitutability is insufficient to include any other paper product within the same relevant product market as corrugating medium.

166. Evidence of price differentials and industry recognition further support the conclusion that corrugating medium is a relevant product market. (Kamerschen Tr. 1246–50). For example, there is a distinct price for medium as opposed to linerboard (Kamerschen Tr. 1248–50), and there is no evidence of producers or customers of medium switching from medium to other products or from other products to medium, based on changes in relative price differentials. Further, corrugating medium is widely recognized as a separate and distinct market within the industry. (Kamerschen Tr. 1250). Weyerhaeuser's plans and internal business documents report and analyze sales and [50] competitive conditions in medium separately from other products, including linerboard. (*See e.g.*, CX 1A-B; CX 2A; CX 3A; CX 4A IC; CX 7 IC; CX 14; CX 15; CX 18C IC; CX 25Z13, Z14; CX 29R, T; CX 34A-C IC; CX 35 IC; CX 37A, C IC; CX 67; CX 107Z147; CX 109Z191;

CX 110D; CX 113; CX 131; CX 132A; CX 152Z47, Z95, Z97 IC; CX 168; CX 180B, Z23; CX 181B IC). Similarly, internal documents from Menasha and International Paper recognize and treat medium as a separate and distinct product in examining market conditions. (*See e.g.,* CX 206; CX 403 IC). In addition, The American Paper Institute, the industry trade association, collects and reports statistical information on medium ("corrugating material") separately from statistics for other products, such as linerboard and box board (*see* CX 622A, D, G, J, L, N, P, R, S; *see also* CX 614 through CX 621; CX 636 through CX 648; WX 1366 through WX 1339), and *Official Board Markets,* an industry trade publication, reports separate prices for medium as opposed to other products. (*See* CX 60A; CX 625A; CX 626A).

167. On the basis of all the evidence of record, therefore, the relevant product market for purposes of analyzing this acquisition is corrugating medium. It should be noted that even the testimony of Dr. Brozen, respondent's expert, appears to support this conclusion. (Brozen Tr. 2920).

B. *The Georgraphic Market*

168. The weight of the evidence establishes that the relevant geographic market for the purpose of analyzing this acquisition is national in scope. (Findings 169–182, below). However, even if I were to find the 11 western states to be a relevant market, as urged by complaint counsel, I still could not find that this acquisition may have the effect of substantially lessening competition or tending to create a monopoly, for the reasons stated in Findings 178–226, below.

1. The Market Is National In Scope

169. Formulae such as the LOFI-LIFO test of Professors Elzinga and Hogarty which has been relied upon by complaint counsel,[17] are useful in some cases, but they cannot [51] substitute for an analysis of the economic factors affecting an industry, where the evidence permits such an analysis. Even Drs. Elzinga and Hogarty have noted that "the absence of substantial shipments in or out of a hypothetical geographic area . . . does not necessarily insulate or determine a geographic market area." (18 Antitrust Bull. at 66, n. 2). In fact, Dr. Elzinga has admitted that the LOFI-LIFO "test is a conservative one which estimates only a minimum size. The actual market may be . . . larger than shipment data would estimate." Elzinga, *Defining Georgraphic Market Boundaries,* 26 Antitrust Bull. 739, 743 (1981). The record evidence shows that to be the case here.

170. The pricing patterns in this industry are the best evidence of

[17] Elzinga & Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal,* 23 Antitrust Bull. 1 (1978); *The Problem of Geographic Market Delineation in Antimerger Suits,* 18 Antitrust Bull. 45 (1973).

the extent of the geographic market. The historical evidence of lock-step pricing between east and west, with such narrow price differentials (liner was actually sold at the same price nationwide until April 1980), is strong evidence of the existence of single national markets for medium and liner. (Findings 121–123).

171. Complaint counsel would explain the close relationship between west coast and eastern prices and between medium and liner as being brought about by the use of "reference points" by western medium producers. (CF 6–58, n. 1). They further maintain that such use of "reference points" is in itself anticompetitive. (CF 6–58, n. 1). However, if the west coast medium market is an insulated market using eastern prices and liner prices as "reference points" in its quest to set noncompetitive prices, it most certainly would set a higher price. Complaint counsel concede that, overall, the E-W Differential has never exceeded the equilibrium transportation cost difference. (Finding 123). As for a comparison with liner prices, the price differential on the west coast between medium and liner has generally fluctuated between $.75 and $5.75 a ton, with liner being the higher priced, over the last decade. (CX [52] 709B-Z2).[18] Certainly if the west coast medium mills were in an isolated, non-competitive market, as claimed by complaint counsel, medium prices would have been pegged much higher with relationship to these "reference points."

172. The only logical explanation for the lock-step pricing between the east and the west, over such a substantial period of time, is that the two areas are competitively connected. (CX 709).

173. The only seeming disparity in this view of the market is the low level of shipments, historically, between the east and the west. However, this fact is explained by the existence of trade agreements and the extremely small share of western medium consumption represented by the open market. (Findings 141–147, 124–132).

174. The trade arrangements act as a substitute for western shipments by the eastern mills that own western box shops. (Findings 141–147). It is clear that the western mills must keep their medium and liner prices near eastern price levels in order to maintain these exchange relationships. If the price gets out of line, it could strain the agreements to the breaking point, causing additional expenses throughout the systems of the west coast producers (Findings 90–100) and drawing in additional eastern medium for the supply of the west coast box shops of the eastern trade partners. (Findings 145–150; CX 162E; Perry Tr. 2326).

175. As long as prices are kept in line with those of the east, however, and all other factors favoring such exchange agreements stay

[18] A similar pricing pattern between liner and medium existed in eastern markets during this decade. (CX 709A-Z2).

constant (Findings 92–95), it is to be expected that these eastern mills will not ship much product to their west coast box shops in the absence of an artificial curtailment of supply in that area. (Finding 143).

176. Similarly, the minimal nature of the open market on the west coast also helps explain the small volume of shipments coming into the west coast area from outside sources. The independent box shops cannot be expected to draw in much medium from outside this area, since they only represent 12% of the [53] consumption on the west coast. (Finding 131). At the same time, 64% of the medium consumed on the west coast is consumed in the box shops of the companies with western medium mills. (Finding 131). This portion is thus removed from the competitive fray for all practical purposes.[19]

177. Furthermore, there *were* increases in western shipments by eastern mills in 1981 and 1982 (CX 953A). Such shipments take on greater significance when the actual size of the market for which the eastern mills could compete is considered. As previously noted, sixty-four percent of the market was controlled by the western medium mills. (Finding 131). A substantial portion of the remainder was also really unavailable, due to the east-west exchange agreements. (Findings 142–145). The fact that the eastern mills supplied about 8% of western medium needs in 1981 and about 10% of such needs in 1982, is far more impressive under these circumstances. (Finding 137). It is also important to note that the eastern mills selling in the open market on the west coast did so at competitive prices and on competitive terms (Finding 136)[20] and that they would have sold even more in that area if a demand was present at the box shop level (the record shows that the eastern firms have been in the market soliciting additional sales). (Finding 148). In view of these circumstances, the fact that 10% of the medium consumed on the [54] west coast *did* come from eastern mills in 1982 (Finding 137) is quite probative.[21]

178. The exchange agreements and the small portion of the market which is competitively available, also help explain away the "natural experiment" cited by complaint counsel's expert Dr. Kamerschen in

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[19] However, even these western producers regularly ship medium from their eastern mills to their west coast box shops. (CX 953A).

[20] Complaint counsel fault the eastern shippers for not undercutting the western suppliers in 1981 and 1982 and thus obtaining a bigger portion of the western sales. (*See, e.g.*, CRB 1–29). However, there was an extremely "soft" market for medium sales during the 1981–1982 recession. (Brown Tr. 2516). It is unreasonable to expect the eastern mills to start a price war in distant areas in order to gain more sales in such a recessionary period. (Brown Tr. 2518). They did come in at a competitive price level, which was as much as $54.25 below the OBM or list price (Diforio Tr. 2122 IC; CX 709Z1–Z2; WX 1200 a part IC, m, t part IC, u, bb part IC, uu, aaa, hhh) and they did apparently undercut some western mills in sales to certain customers at some times. (WX 1200u-R; WX 1200 a part IC, m, t part IC, bb part IC, uu, aaa, hhh).

[21] Nor does complaint counsel's argument that some of this eastern medium is of "special" grades detract from this point. (CF 3–24, 3–25). The record shows that the eastern shipments were not limited to special grades (WX 1200a part IC, b part IC, m, u, t part IC, bb part IC, uu, aaa, hhh; *see also*, CF 3–26 and 3–27), and even the shipments of such special grades are an indication of the profitability and feasibility of shipping medium west from the eastern mills.

support of his position that the west coast market is the relevant market area. (CF 3–28 through 3–33). Dr. Kamerschen and complaint counsel contend that since not much additional eastern medium was lured into the west coast box shops in 1981 and 1982, when the E-W Differential jumped from $4.25 to $34.25, this is proof that there is a separate west coast market. (CF 3–28 through 3–33).

179. Aside from the fact that this was a temporary aberration in the E-W Differential (albeit it did last for over 2 years and has yet to go back to the old level) and the fact that eastern producers were attempting to raise their prices by the same amount in the east (Finding 123, n. 11), this argument completely ignores the exchange agreement mechanism and the size of the market available competitively. (Findings 131, 174–177). It also ignores the fact that relatively substantial increases were made in shipments from the east during this period. (Finding 177; CX 953A).

180. The evidence indicates that the west coast box shops had an adequate supply of medium available throughout this, as as well as all other time periods covered by the evidence. (Perry Tr. 2332; Brundage, JX5–J; Watts Tr. 1979–81; Howard Tr. 2065–67 IC; Price Tr. 2206). Any curtailments of production in late 1981 and 1982 were due to the fall off in demand for boxes and, therefore, corrugated board, due to the recession. (Finding 151, n. 15; Findings 238–242, below). Moreover, the price increase on the west coast for medium and liner was perceived by eastern producers as a justified one, as can be [55] seen by the fact that they were trying to obtain the same price increase in the east. (CX 709W, Z). Therefore, nothing had happened which would warrant discarding the advantages of the trade agreements (including higher mill nets on the eastern portion of the trade in at least some cases) for the sake of shipping more medium west. (*See* Finding 143).

181. On the other hand, if there were a collusive curtailment of medium supplies to the west coast box shops, the eastern producers would be free to ship in whatever additional medium their box shops needed and the record indicates that they would do so. (Findings 145–151). Also, such curtailment would undoubtedly result in greater success for those eastern mills that have been soliciting additional sales in the open market on the west coast. (Finding 177).

182. The above facts also indicate that transportation costs are not a constricting force. Therefore, since there are no legal obstacles cited by complaint counsel which would tend to narrow the market, the relevant geographic market area must be the national market. Kenneth G. Elzinga, *Defining Geographic Market Boundaries*, 26 Antitrust Bull. 739, 740 (1981).

183. When considered on a national market basis, this acquisition

clearly has no tendency to substantially lessen competition in any line of commerce or create a monopoly. When even a portion of the capacity of the eastern mills is considered along with the capacity of western mills, the concentration level falls below those levels considered potentially injurious by the Justice Department *Merger Guidelines* [Trade Reg. Rep. (CCH) No. 546, at 5 (June 16, 1982)]. (*See* Findings 189–193; and Tables 1 and 2, below). When the total national capacity is considered, then, the concentration level is obviously of no concern. (*See* WX 1355A-C).

C. *If There Were A Western Market*

184. Even if I should ignore these facts and look only at the shipments out of and into the 11 western states (the LOFI-LIFO test) other factors would mitigate against finding anticompetitive effects related to this acquisition.

185. In the first place complaint counsel's market share tabulations are too restrictive. Neither those based upon west coast consumption (CF 4–11, 4–12, Table IV–1), nor those which complaint counsel have calculated based upon capacity (CF 4–12, [**56**] 4–13, Table IV–2), adequately account for factors which would affect the decisions of prospective colluders in this market. (Findings 186–190, below).

186. The consumption market share tables calculated by complaint counsel are based on a market universe that is limited to the current consumption of medium on the west coast. (CF 4–5). This approach ignores the fact that colluders would have to anticipate that their collusion might bring on board additional production for west coast consumption; from swing mills on the west coast and from eastern mills, especially those with west coast box shops. (Findings 126, 128, 129, 133–140). It also ignores the existence of idle capacity on the west coast which would have to be considered as a threat by potential colluders. (WX 1200f-D; WX 1200i-H; WX 1200p-E; WX 1200v-C; WX 1200ee-C; WX 1200ii-G; WX 1200pp-C; WX 1200qq-D; WX 1200ppp-C,O). No collusion would be likely unless the conspirators were reasonably certain that their actions would not be undermined by these sources. The profit in containerboard for the large integrated companies is primarily made at the box shop level. (Wollenberg Tr. 609–10; Brozen Tr. 2773–74). So long as this other capacity was available to supply competing box shops the colluders could not afford to jeopardize their position in this end of the market by curtailing shipments to their own and competing box shops. Since current consumption figures fail to consider these very real factors in the market, they are deficient for the purposes of this case. The preferred basis for calculating market shares is, therefore, capacity.

187. Although complaint counsel did calculate market shares on a

capacity basis also, they failed to adequately account therein for all of the capacity available on the west coast and the true potential of the eastern mills to provide for any deficiencies in the west coast medium supply. (Findings 141–151 above; and 188–190 below).

188. In calculating west coast market shares based on capacity, complaint counsel include eastern mills only to the extent those mills have shipped to the west coast states in the past. (CF at p. 69, Table IV–2). This methodology again fails to account for the demonstrated intent of eastern mills with western box shops to keep those box shops adquately supplied. (Findings 142–147). It also fails to consider the fact that these and other eastern mills have solicited additional medium sales in the west. (Watts Tr. 2001–02; Price Tr. 2232; Diforio Tr. 2116–17; Brundagé, JX5 F-H). [57]

189. While it is impossible to precisely determine how much of the capacity of the eastern mills should be included in any determination of market shares in a "west coast market," such determination should at least include that portion of an eastern company's capacity which would be necessary to supply its own west coast box shops in the event the medium supply to those box shops were cut off. (Findings 142–147). This would still be a conservative figure, since it would not account for the fact that most of these companies also have sold on the west coast open market in the past. (Finding 148).

190. As for the other eastern companies which have been selling medium in the west, there is no record basis, other than their past sales, upon which to base a projection of their possible sales in the event of a collusive curtailment of production on the west coast. However, as the figures below will show, the concentration ratios fall below the critical level even without projecting any increased sales levels for these companies. (Tables 1 and 2 below, and Appendices II and III). Therefore, I have taken a conservative approach and included such companies only at the level of their 1982 sales in the west.[22]

191. With these considerations in mind I have calculated market shares, based on capacity, as follows: [58]

Table 1

Pre-Acquisition Market Shares - Top 8 and Cumulative - Based on 1982 Capacity Data

Company	1982 Capacity	% of Total	HHI
Willamette	202,279	13.0%	169.00
Crown Zellerbach	175,725	11.3%	127.69
Menasha	152,911	9.8%	96.04
Georgia Pacific	142,000	9.1%	82.81
Longview Fibre	133,125	8.5%	72.25

[22] I have not adopted respondent's proposal to consider 10%–25% of the capacity of these eastern mills (RRB, App. B), since there is no record support for this position.

Weyerhaeuser	121,730	7.8%	60.84
Container Corp.	109,804	7.0%	49.00
Boise Cascade	97,625	6.3%	39.69
All Others	422,640	26.9%	101.82
Total HHI			799.14

CR–2 24.3%
CR–4 43.2%
CR–8 72.8%

(*See* Appendix II for details) [59]

Table 2

Post-Acquisition Market Shares - Top 8 and Cumulative - Based on 1982 Capacity Data

Company	1982 Capacity	% of Total	HHI
Weyerhaeuser	274,380	17.6%	309.76
Willamette	202,279	13.0%	169.00
Crown Zellerbach	157,725	11.3%	127.69
Georgia Pacific	142,000	9.1%	82.81
Longview Fibre	133,125	8.5%	72.25
Container Corp.	109,804	7.0%	49.00
Boise Cascade	97,625	6.3%	39.69
Louisiana Pacific	95,850	6.2%	38.44
All Others	327,051	20.7%	63.38
Total HHI			952.02

CR–2 30.6%
CR–4 51%
CR–8 79%

(*See* Appendix III for details) [60]

192. As previously noted, these tabulations are conservative ones, since there is much capacity excluded from my tabulations. For example, the volumes of medium consumed in the western box shops of Southwest Forest Industries and Union Camp Corp. are not included, despite the fact that both of these companies produce liner, which is easily traded for medium. (WX 1200ccc; WX 1200iii; Findings 90–97, 128, 129). Also, as noted in Finding 190 above, the figures for eastern shippers having no west coast box shops are understated, since they do not reflect market conditions wherein the supply has been curtailed due to collusion rather than box shop demand. Then too, even the capacity figures for the eastern companies with western box shops are understated, since they do not include any sales on the open market, despite the fact that most of these companies have made such sales in the past. (Findings 148, 189). Furthermore, my tabulations do not include sales by brokers or Belkin Paperboard of Canada. (Findings 134, 137).

193. In view of the fact that the post-acquisition HHI is still well below the critical level discussed in the Justice Department *Guidelines,* and considering the other factors noted in my findings below,

the evidence herein fails to establish that this acquisition may substantially lessen competition, or tend to create a monopoly, in any line of commerce.

D. *Entry Barriers*

194. Contrary to the contentions of complaint counsel (CF 5–1, *et seq.*), entry barriers are very low in the "west coast medium market," especially for expansion into the west coast market by eastern mills and the incremental expansion of the capacity and production of western mills. (Findings 195–225, below).

1. Capital Costs

195. Complaint counsel and their expert, Dr. Kasmerschen, rely heavily on the capital costs of entry as a barrier to entry in the west coast medium market. (CF 5–3 *et seq.;* Kamerschen Tr. 1325). The capital cost of constructing a new semichemical mill is substantial. Estimates of the cost varied, but Mr. Clark Johnson of Virginia Fibre stated that, based on recent estimates it would cost approximately $180 million to construct a 600 ton-per-day or scale-sized semichemical medium mill. (Johnson Tr. 455). On the other hand, Mr. Locke testified that its new Pine Hill, Alabama medium facility was approximately $150 million out of the total cost of $220 million spent to both **[61]** increase liner production and add medium production at that plant. (Locke Tr. 972).

196. The cost of constructing a new recycled mill is less than the cost of constructing a semichemical mill, primarily because a recycled mill has less expensive pulping facilities than does a semichemical mill. [***] Other estimates concerning the cost of a recycled mill varied somewhat from this figure, but such estimates generally were with regard to a mill larger than 300 tons per day. (Countryman Tr. 1075–76). In short, the available evidence suggests that a new efficient scale-sized recycled medium mill could be constructed for somewhere between $75 million and $100 million.

197. While the cost of a new mill, semichemical or recycled, is considerable, its size must be assessed in the context of the capital required for other primary facilities. As explained by Mr. Clephane, medium mills tend to be less expensive than other paper facilities because the "market scale" for a medium mill "is considerably smaller than what is viewed to be a market scale investment in other parts of the paper industry such as linerboard, market pulp, newsprint, things like that. And secondly, the capital cost per ton is lower for medium than it is for basically any other single product within the paper industry. Particularly, when you think about recycled medium facilities." (Clephane Tr. 2608).

198. The capital cost of a medium mill must also be viewed in light of the sums being spent by forest products companies for various operations. International Paper spent $600 million for its new Mansfield, Louisiana containerboard complex. (Brown Tr. 2454). Similarly, MacMillan Bloedel expended approximately $220 million to upgrade the liner capacity and to add medium capacity to its Pine Hill, Alabama complex. (Locke Tr. 926). Other examples of massive commitments of capital by the industry are found in Weyerhaeuser's expenditure of "over a billion dollar[s]" for capacity expansions in its fiber businesses since [62] 1975 and Champion's current construction of a hardwood pulp mill in Quinnesec, Michigan at a cost of $500 million. (Waechter Tr. 1688; Diforio Tr. 2099; *see also,* WX 1331 A-R).

199. Most significant, however, is the fact that there was no testimony that any company has been unable to obtain the capital financing required for *any* primary mill facility. (Locke Tr. 976). While this is not surprising, given the overall size of the companies involved in the industry, the ability to obtain financing extends to even small independent operations, such as Virginia Fibre. (Johnson Tr. 449–50, 453). Nor is Virginia Fibre unique in the industry. Its founder came from another independent containerboard producer, Great Southern, which operates a large liner-medium complex in Cedar Springs, Georgia. (Johnson Tr. 443–44; WX 1303 C).

200. Finally, the existence of plans for new medium producing facilities, both semichemical and recycled, including plans for a recycled plant on the west coast, is proof that the capital cost of such entry, although very high, is not a barrier. (Countryman Tr. 1079–83; Diforio Tr. 2100–01; [***] Justus Tr. 2294–96 IC; WX 1207; WX 1217 A-C; WX 1506 B; CX 411Y IC; CX 427 Z9).[23] Although most, if not all, of these plans have been postponed due to the "soft" market conditions during the recent recession, such plans are proof that capital costs are not a barrier to entry. (Countryman Tr. 1079–83; Diforio Tr. 2100–01; [***]). As Professor Bain, one of the authorities cited by complaint counsel (CF 5–2), has stated:

> Entry cost as a barrier to entry is a relative thing. A mere showing that there are high capital requirements does not establish the existence of a significant [63] entry barrier. It must be proven that such capital requirements are beyond the capabilities of the potential entrants. [Bain, *Industrial Organization 251–253 (1959)*].

[23] There is evidence showing that, as of September 1982, Inland Container Corporation intended to build a new recycled paperboard mill at Ontario, California. (WX 1217A-C). A witness scheduled to appear from this company was cancelled. Thus, it might be inferred that such plans have been postponed or cancelled. However, the fact that plans had gone so far as to allow the filing of an application for permits to construct and operate this plant is evidence that there is no substantial barrier to such construction. (WX 1217A-C).

2. Economies of Scale

201. Complaint counsel and their expert also refer to economies of scale as a barrier to new entry in this industry. (Kamerschen Tr. 1330; CF 5–10 through 5–13). However, the existence of building plans by various companies also belies this contention. This contention also ignores the possibility of expansion of facilities in the west and other parts of the country to serve the west coast area. Another of complaint counsel's experts, Mr. Charles Pidano, conceded that a Weyerhaeuser study showed the expansion of Weyerhaeuser's Valliant, Oklahoma mill (an eastern mill by complaint counsel's market definition) had the "best economics," out of several alternatives, for the supply of medium to the west coast. (Pidano Tr. 1218–19 IC).

3. Lead Times

202. While there are a variety of estimates in the record concerning the lead time for building a new semichemical mill, the parties have stipulated that, after it has been decided that a new mill should be constructed, production occurs three or more years later (CX 651, Stip. 64). If anything, the evidence indicates that from the date of a Board of Directors decision, the construction time is less than three years. For instance, International Paper constructed its Mansfield, Louisiana complex within 2–½ years of authorization and MacMillan Bloedel constructed its new medium facility within approximately 2 years of Board approval. (Brown Tr. 2445, 2447; Locke Tr. 922).

203. The time between the beginning of construction and the commencement of operation for a recycled mill is approximately two years. (Waechter Tr. 1711). According to Mr. Justus of Beloit, the "full line" of equipment could be ordered, installed, and operating "in about two years." (Justus Tr. 2294–96 IC).

204. Thus, with regard to either recycled or semichemical mills, new mills can be built within the approximate time frame of two years used in the *Guidelines*. Then too, the initiation of construction itself would deter present producers from [64] artificially raising prices, since their customers would also realize that new suppliers would be available in the near future.

4. Environmental Restrictions

205. Complaint counsel's contention that environmental laws present a substantial barrier to entry are highly speculative and unsupported by factual evidence. (CF 5–23 *et. seq.;* Kamerschen Tr. 1339). The record fails to reveal any plans for construction or expansion which have been cancelled due to environmental restrictions.

(Countryman Tr. 1079–83; Diforio Tr. 2100–01; [***] Justus Tr. 2294–96 IC).

5. Access to Mill Sites and Raw Materials

206. There does appear to be a shortage of attractive mill sites for new semichemical medium facilities on the west coast. (CX 101F; CX 25Z2). However, there is no evidence of record revealing a lack of possible sites for recycled mills on the west coast. (Celephane Tr. 2614–15). Nor does it appear that there is a shortage of sites for semichemical mills in other parts of the country. (Kamerschen Tr. 1502; Johnson Tr. 445; Countryman Tr. 1069; Diforio Tr. 2098–99; Brown Tr. 2471–72; CX 413B IC).

207. Complaint counsel cite to possible shortages of OCC (old corrugated container) as a barrier to construction of recycled mills. (CF 5–32, 5–34). The evidence they cite refers to a shortage of OCC in 1979, due to a substantial increase in exports and indicates a need to improve the OCC collection network if such situation persists. (CX 633–635; Countryman 1066–67). Oddly enough, the witness to whom complaint counsel cite in support of this contention, Mr. Countryman, refers to this as "a rather unique incident." (Countryman Tr. 1066). The fact that Willamette is in the process of expanding its recycled medium facilities by 180 tons per day and also that there are plans in existence for another company to build a new recycled plant in California, would indicate that this is not a continuing problem. (CX 348L, J; WX 1217 A-C). Conversion of facilities to recycled medium production in other parts of the country also indicate that the industry believes there is an adequate supply of OCC. (WX 1200j-E; [***]).

208. Complaint counsel also contend that wide and frequent fluctuations in OCC prices would deter entry into the [65] manufacture of recycled medium. (CF 5–33). However, witnesses have cited these very same cost fluctuations as being an advantage for a recycled mill. They note that the attractiveness of OCC stems from the fact that its price tends to move in the same direction as the price of containerboard in general. (Countryman Tr. 1102; Brown Tr. 2463–64). As explained by Mr. Brown of International Paper,

> [O]ne of the advantages of having recycled fiber as your source of fiber is that the cost of your raw material fluctuates in concert with the cost of your product. So in soft markets when you may find discounting of the medium prices, you are probably going to find prices of the old corrugated containers that are used as the raw material being depressed as well. So you can essentially lock in a margin that . . . moves with the price fluctuations or economic fluctations of your product. (Brown Tr. 2463–64).

6. Costs for New Mills

209. Complaint counsel also contend that new mills would be faced with significantly higher capital costs than established firms in the market and that such higher capital costs would more than offset any operating cost efficiencies that could be gained through such new mills. (CF 5–9). The internal Weyerhaeuser documents used to support this contention generally refer to the relative advantages or disadvantages, from a cost standpoint, between a new mill constructed in the 1980's and one constructed during the 1970's, as compared to advantages which new mills constructed in the 1970's had over mills constructed prior to that time. (CX 182P-Q; CX 109Z185; CX 171I IC; CX 147Z156 IC). Thus, at most, the documents suggest that operating cost reductions in new mills vis-a-vis *scale size* mills built *after* 1970 are offset by increased capital costs. (*Id.*) The weight of the evidence, however, indicates that there is still a cost advantage for a new mill, as compared to the average cost within this industry. Mr. Clarke Johnson of Virginia Fibre, for example, when asked if he agreed with the statement that the total costs per ton for new mills are no longer favorable to those of existing mills, testified

> [T]hat implies that the newer mills are not more efficient than older mills. And I would have to say any time you build a new mill, [66] when you are talking about old mills as a group, there could be some very old mills who are very inefficient in energy utilization or whatever, whereas a new mill is built to be highly energy efficient. So as a general statement, I would have to disagree with it. (Johnson Tr. 490).

Mr. Johnson was including the cost of complying with environmental regulations in making this comparison. (Johnson Tr. 490). Mr. Locke of MacMillan Bloedel also testified that "[i]t is our belief that the newer mills have better cost effectiveness, total cost effectiveness than most older mills." (Locke Tr. 973). The cost effectiveness of new mills is also supported by the testimony of other knowledgeable witnesses, with first-hand experience with new mills. (Justus Tr. 2286; Brown Tr. 2472–73, 2475 IC). As explained by Mr. Brown of International Paper, which has recently constructed a new mill complex at Mansfield, Louisiana (WX 1200jj-B), "including fixed costs and including depreciation, you could say that at startup a new mill in total cost terms may not be lower cost than the most, the lowest cost existing facility . . . But I would say in terms of the average cost of the industry, certainly a new mill on a total cost basis would be lower than the average cost of the industry." (Brown Tr. 2473). In this regard it should be noted that of the thirteen mills on the west coast, eleven were built before 1970. (CX 305C; CX 312C; CX 316C; CX 319C; CX 324C; CX 328B; CX 329C; CX 333C; CX 340C; CX 348C, I; CX 332C;

CX 170C). A new mill would enjoy a considerable cost advantage over these eleven mills. (*See, e.g.*, CX 182Q). Of the remaining two mills, one was started before 1970 (CX 348C) and neither approaches the estimates in the record of scale size (600–650 TPD). (*Id.;* CX 319C).

210. Further, as Mr. Brown explained, comparing new mills with existing mills on the basis of *total* costs is meaningless in assessing the cost competitiveness of the mills.

> [R]eally what we look at are the variable costs. And what we want to assure ourselves is that we will be lowest or as low as possible in the variable cost of the operation of the facility . . . It is the way we analyze major capital investments. Probably the primary financial indicator we use is the discounted cash flow return on investment. And cash flow means adding the [67] net income of the operation plus the noncash charges. And depreciation is considered to be a noncash charge. So essentially you are adding that depreciation back and determining the annual cash flows from the investment. (Brown Tr. 2473–74).

211. Mr. Brown's view on measuring the cost effectiveness of new mills was confirmed by Mr. Thomas Clephane, a forest products industry financial analyst. Mr. Clephane explained that companies in this industry "are generally looking at variable cost in comparing the profitability of the new facility with the average for the plants in existence." (Clephane Tr. 2609).

7. Entry By Eastern Mills

212. Next, and possibly most importantly, complaint counsel's discussion of barriers does not consider the potential of entry into the "west coast market" by eastern mills. Dr. Kamerschen conceded that most of the conditions of entry which he discussed, such as environmental restrictions, lead time for construction, availability of raw materials and sites, economies of scale, capital costs, etc., have no bearing on the ability of eastern producers to enter the west coast through shipments. (Kamerschen Tr. 1499–1501). Because assessment of entry conditions (like product and geographic market definition) is to be based on the assumption of a collusive price increase, shipments are a particularly likely means of new entry. Since shipments are already "economically feasible" (Findings 133–140, 142), those made in response to an artificial price increase necessarily would be even more attractive. Indeed, the evidence showed that a large number of eastern producers would ship in response to the economic incentives such a price increase would provide. (Cassidy Tr. 862–63 IC, 871; Campbell Tr. 682; Locke Tr. 988 IC; Perry Tr. 2339, 2343 IC, 2345–47 IC; Price Tr. 2209; Diforio Tr. 2126, 2130–31).

213. Eastern mills also can readily increase their total production to respond to increased demand on the west coast. Thus, the enhanced

attractiveness of shipments in the event of a collusive price increase would lead these producers to utilize fully their existing capacity, to incrementally expand production, and to divert shipments from the east in order to serve the west coast. (Findings 133–151). [68]

214. As discussed previously, incremental expansion through modernization, debottlenecking and technological improvement is an ongoing, routine and relatively inexpensive means of bringing on new capacity in the industry. (Finding 150; *See also,* Kamerschen Tr. 1330). Moreover, these forms of increasing capacity can result in significant increases in output, often up to 25 percent or more, within a short period of time. (Justus Tr. 2278). Thus, present and potential eastern shippers and existing firms on the west coast can readily and substantially increase their capacity to service the west coast consumers whose supply of medium would be constrained by any attempted collusion.

215. Such possibility is enhanced by the fact that mills in other sections of the country, particularly the southeast, have significantly lower costs than the west coast mills. Mr. Timothy Campbell of Southwest Forest Industries testified that the south had the following advantages:

> First would be lower wood costs. Secondly would be a more favorable labor climate. Certainly it would be easier to get the necessary environmental permits in most of the southern states as compared to Oregon, Washington or California. (Campbell Tr. 696–97).

Mr. Edward Locke of MacMillan Bloedel counted among the cost advantages of the south such considerations as

> [a]bundant supply of wood, abundant source of energy, good labor environment, good supply of labor. (Locke Tr. 977).

The weight of the testimony and evidence of record reveals that medium mills in the southeastern United States have a substantial cost advantage over those medium mills located in the Pacific Northwest. (Johnson Tr. 491; Countryman Tr. 1106; Presson Tr. 1563; Brown Tr. 2469, 2476 IC, 2479–80 IC; Diforio Tr. 2106 IC; Clephane Tr. 2610–13; WX 1179 A IC; WX 1702A127–A130). Other evidence of record substantiates this, because it indicates that past shipments to the west coast by eastern mills have been at competitive prices and service terms and have been profitable. (Findings 136, 148, 176).

216. Therefore, since there are no barriers to entry by these eastern mills, and considering the cost advantages which the southern mills enjoy, along with their record of past [69] shipments and the determination of eastern mills with western box shops to keep those box

shops adequately supplied, it is to be expected that any collusive activity among west cost mills would lead to a more substantial entry by eastern mills. (Findings 142, 212–215).

8. Expansion By Western Mills

217. Another important form of entry, in the event of a collusive market, is the expansion of capacity by existing western medium mills. All west coast medium suppliers would not be expected to participate in a collusive curtailment of supply. (Brozen Tr. 2826–27). Dr. Kamerschen, though he was unwilling to identify any of the individual firms that would collude, did acknowledge that those with a smaller share of the market would be less likely to do so. (Kamerschen Tr. 1464–70).

218. Not only do most of the west coast mills already have excess capacity (WX 1159; WX 1200f, p, v, z, ee, ii, pp, qq, ppp), but it is easy and inexpensive to add incremental capacity to existing mills in this industry. (Finding 150).[24] In fact, the western mills have been adding substantial capacity in the recent past and many have plans for further expansion in the near future. For example, Menasha invested $2.8 million to expand the capacity of the North Bend mill in 1976–77. (CX 48Z27). Weyerhaeuser has also invested, and has stated an intent to make further investments, in order to expand the capacity of the North Bend mill. (CX 172; CX 651 Stip. 84). Most recently, Willamette invested $25.6 million to expand the capacity of its Port Hueneme, California mill. (CX 348L). Other west coast medium producers either have expanded or have plans to expand their capacity. (CX 319D; CX 332D; CX 312D, N) [70]

219. Thus, there would be a number of remaining firms that would have a strong incentive to expand their own capacity incrementally in response to any collusion by others. The smaller firms in the market, for example, would be important factors in deterring collusive behavior. The record shows that some of these firms were aggressive in their pricing during the recent recession and that they are important suppliers to the open market. (WX 1200 a D-N part IC; WX 1200b C-E part IC; WX 1200t S-A1, A4–A16 part IC, A21–A24; WX 1200u J, K, N-Z; WX 1200 bb A6–A32 IC, A35–A48, A276–A494; WX 1200uu B, C, D; WX 1200aaa H, L, P-Q, W, Z; 1200hhh B-E, H). Therefore, their pricing practices have an important bearing on open market prices, which, in turn, have a direct effect on OBM prices and the price

[24] Complaint counsel discount the possibility of some of the smaller west coast firms adding incremental capacity. (CF 5–46 through 5–54). They refer to Longview Fibre, Louisiana Pacific, Inland, Newark and Specialty Paper as having smaller width machines which are allegedly not as adaptable as larger machines to incremental expansion. However, Mr. Justus of Beloit Corporation was not that restrictive in his testimony concerning the possibility of expansion. (Justus Tr. 2278, 2280). Moreover, complaint counsel have mistakenly included Longview Fibre in this group, since it has two 165 inch machines which are capable of producing medium. (Wollenberg Tr. 549, 551). WX 1200f-D; WX 1200ee-C; WX 1200vv-H).

structure of the medium market. (Finding 120). Their influence on the market is further enhanced by the small size of the open market in this industry. (Finding 131).

9. Swing Mills

220. The presence of swing mills on the west coast also enhances the probability that non-colluding west coast mills would increase production in response to any collusive curtailment of supply. (Findings 81–82). Indeed, the fundamental purpose of a swing machine is to provide the manufacturer with the flexibility of producing various products based on relative economics. Thus, as explained by Mr. Locke of MacMillan Bloedel, "[m]ills that have multiple product capabilities always manufacture those products" with "the highest return." (Locke Tr. 977). Likewise, mills that are designed to swing between liner and kraft sack typically produce the product that has the greatest demand or the best return for the manufacturer. (Wollenberg Tr. 550).

221. The likelihood that west coast swing mills would produce more medium than they do now should a curtailment occur is further confirmed by the fact that those mills obviously find it profitable to swing to medium from time to time at present prices. If medium prices were to rise relative to liner prices due to a curtailment of medium supply, Crown Zellerbach and Longview Fibre would obviously find it relatively more profitable to make medium and could be expected to respond accordingly. (Brozen Tr. 2756, 2762, 3365).

222. The sensitivity of swing mills to market conditions is borne out by the fact that there have been fluctuations in the [71] amount of medium and liner produced at such mills. For instance, while in 1981 Crown's Antioch mill produced 17,537 tons of medium, in 1980 it produced zero tons, but in the preceding year, 1979, the figure was 12,774 tons. Similarly, in 1977, it produced 10,229 tons, while in 1978 it produced 17,034 tons. (CX 702C, E, G, K, I). Further evidence of the sensitivity of swing mill production to competitive conditions is found in the testimony of Mr. Wollenberg of Longview Fibre that "there [are] no hard and fast rules. We look very hard at the economics in each case" in deciding whether swinging to another product makes sense. (Wollenberg Tr. 550).

223. In the past, swings between medium and liner, while showing fluctuations and profit sensitivity, have been influenced by the fact that domestic prices for the complementary products of liner and medium have traditionally moved together, with liner prices being higher. (CX 709 A-Z2; CX 710 A-D). Under complaint counsel's theory, however, the price of medium alone would rise. A 5% medium price increase, for example, would make the per-ton price of 26 pound

medium higher than the per-ton price of 42 pound liner. Any historical balance in the use of swing capacity would necessarily be affected by this change in relative prices. (Findings 221–222).

224. Dr. Kamerschen implicitly admitted the strength of the competitive interrelationship between liner and medium not only by including swing mills in one of his calculations of concentration (CX 703 A-N), but also by suggesting that a shift from liner to medium by firms such as Crown Zellerbach would put upward pressure on the price of liner by reducing the supply of liner. (Kamerschen Tr. 1309). Under this reasoning, however, the downward force on the price of medium exerted by swing mills would be even greater. For instance, Crown's Antioch facility produced 165,096 tons of liner in 1981 or 6 percent of all liner produced on the west coast. (WX 1200v S; WX 1356 A-B). On the other hand, Crown's potential medium production in 1981 would have constituted 17 percent of the total medium produced on the west coast. (CX 316D; WX 1354 A part IC). If Dr. Kamerschen believes that withdrawing 6 percent of the supply of liner would have an impact on liner prices, then the increase of 17 percent in medium production would necessarily have a far greater impact on the price of medium. Indeed, under these circumstances, it would appear that Crown Zellerbach would only have to direct a small portion of its liner production to medium before the price of medium would be affected. [72]

225. Dr. Kamerschen sought to discount the significance of swing mills by characterizing them as tending to be higher-cost facilities than mills that make only one product. (Kamerschen Tr. 1307). However, the cost of a swing mill compared to other mills is immaterial in assessing whether the mill will shift from one product to another. Because a swing mill has a given cost structure to begin with, it is only concerned with producing whichever product is most profitable to it. (Brozen Tr. 3365).

E. *Concentration Trends And The Volatility of Market Shares*

226. The market shares of the leading firms have been relatively unstable over the past several years. Even under complaint counsel's market share tabulations there have been significant shifts in market positions during the period 1977–1981. (CF at p. 67, Table IV–1). In 1977 Container Corp. would rank number 2 under those tabulations, although by 1979 it had fallen to fifth place. Menasha climbed from fourth place to second between 1979 and 1980. Weyerhaeuser moved from sixth to fourth. Boise Cascade fell from fourth to as low as seventh and went back up to sixth during this short time period. Louisiana Pacific, which complaint counsel would place in the number eight position in the market in 1981, was number 4 in only 1979

(and number 9 in the interim year, 1980). (*Id.*). Moreover, there is no indication in the record of a significant trend toward concentration prior to this acquisition.

F. *Claims of Collusive Behavior*

1. Claims of Past Non-Competitive Behavior

227. Complaint counsel's claims of past non-competitive behavior are based on innuendo rather than facts. (CB at 224; CF 6–45 through 6–72). Even their own expert, Dr. Kamerschen, failed to reach the conclusion that the west coast medium market is now, or has been in the past, non-competitive. (Kamerschen Tr. 1371; *See also,* Tr. 1352, 1358–59, 1367–68, 1432–33, 1520). The principal contention in this regard is that Weyerhaeuser and others in the west coast market have collusively engaged in the practice of taking market related downtime in order to maintain or raise prices. (CF 6–59 through 6–72). Yet, complaint counsel have only been able to point to two periods when market related downtime has been taken (CF 6–61, 6–66) and, in each instance, such down time has been dictated by market conditions and has had substantial business justification. (Findings 228–242, below). In fact, in both instances, such market downtime occurred on a nationwide basis. [73] (CX 622D, J, L; CX 155; CX 157). Moreover, in at least the 1974–75 period, the reduction in production of medium and liner was substantially greater in the rest of the nation than in the west. (CX 622D, L).

228. Furthermore, although prices appear to have remained stable in the 1974–1975 period of market downtime (CX 709F-J),[25] they did not remain stable during the 1981–1982 recessionary period. The record shows that discounting accompanied the recession which started in the last quarter of 1981. (CX 155B-C; WX 1200a D-N part IC; WX 1200b C; WX 1200t R, V-W, X-A8 part IC; A21–A24; WX 1200u P-Z; WX 1200bb A6–A31 IC, A276–A395, A421–A494; WX 1200uu D; WX 1200aaa H, L, P-Q, W, Z; WX 1200hhh B-I).

a. *1974–1975*

229. Complaint counsel admit that the period beginning in the last quarter of 1974 and extending into 1975 was characterized by a very sharp decline in the demand for medium, as reflected in the level of

[25] Only OBM prices are available for the 1974–1975 period. (CX 709E-J). No transaction prices are in evidence for that period. If OBM prices were all that were in evidence for the 1981–1982 period, the extent of discounting would be unknown for this period also. (CX 709Z–Z2; WX 1508). OBM did not even pick up the fact that discounting existed on the west coast until late in 1982 and even then it did not report such discounting accurately. (WX 1508Z). By July 1982, long after discounting had actually begun, OBM was reporting that discounts of $20.00 per ton were available on the west coast. (WX 1508Z). In fact, much larger discounts had been available months earlier. (*See, e.g.,* WX 1200a H-I, L-N; *See also,* WX 1200 b C; WX 1200 t R, V-W, X-A8, A21–A24; WX 1200u P-Z; WX 1200bb A6–A31 IC, A276–A395, A421–A494; WX 1200uu D; WX 1200aaa H, L, P-Q, W, Z; WX 1200hhh B-I).

box shipments. (CF 6–59). At the same time, they fault respondent Weyerhaeuser and other west coast producers for cutting back on production, primarily through downtime, and maintaining existing price levels. (CF 60, *et seq.*).

230. The 1974–1975 period in question was a very unique period for the containerboard industry on a nationwide basis. [74] The paper industry as a whole (including west coast medium producers) was under price controls from August 15, 1971 until June 30, 1974. (WX 1607 A-G; WX 1107 A-D; WX 1108 A-C; Waechter Tr. 1717–18; Brozen Tr. 2892, 3212–14). During the period of mandatory price controls (from August 1971 through March 1974), the real price of medium on the west coast (the OBM price deflated by the Producers Price Index) declined 11.7% (from $107.95 to $95.28). (WX 1706 B). In March 1973, in order to ameliorate the impact of an expected "bulge in prices when controls ended," the government progressively decontrolled prices through voluntary agreements with the paper industry, among others. (WX 1607 B-C). That arrangement, which allowed a $20 increase in containerboard prices, expired on July 1, 1974. (WX 1107 C). At that time, OBM reported a $30 increase in all containerboard prices.

231. Such post-price control increases were common throughout the economy. (Brozen Tr. 2892). They were expected by the government, because of the pent-up cost pressures from the price controls and the impact of the 1973 Arab oil embargo and the approximate tripling of the landed price of imported crude oil and labor wage demands to recover from the period of wage controls and to pay for higher fuel bills. (WX 1607 D-F).

232. Both before and after March 1974, containerboard producers experienced significantly increasing energy, wood, wastepaper and labor costs. (Waechter Tr. 1718–19; CX 109Z229; WX 1606 F). Containerboard production is more energy-intensive than other industries and it also experienced significant escalations in wood chip prices. (Brozen Tr. 3228; CX 26 N, Q; CX 830 Z13–Z14). These increased costs were coupled with strong demands, as box buyers built inventories of finished boxes in anticipation of the release of price controls. (Waechter Tr. 1718).

233. The cost pressures continued, notwithstanding a "very precipitous drop off in demand that began in October of '74." (Waechter Tr. 1717–18; WX 1713; CX 106C). The "abrupt" decline was unique because of the prior "hoarding" of finished boxes. (*Id.*) Liner and medium production, east and west, all dramatically declined in response to this drop in demand. (WX 1735 A-C). Mr. Wollenberg of Longview Fibre testified that he shut down his entire eleven paper machine mill complex. (Wollenberg Tr. 618–19).

234. Despite the downturn in demand, Weyerhaeuser was experiencing rising costs, which squeezed price/cost margins. [75] As Mr. Waechter explained:

> [T]his terrible dropoff in demand took place and yet we had a period of ever-increasing costs: wood costs were going up, labor costs were going up, energy costs were going up at great rates. I think that was coined by the economists as a period of stagflation. We had no demand and yet we had increased costs which put a tremendous pressure on margins. So what was happening to our price of containerboard through that '75 period was, we were getting terribly squeezed in the margin sides by increased costs, and no relief in the nominal price of containerboard and, in fact, we had a real price decrease due to the inflation eating at the margins. (Waechter Tr. 1719).

235. Dr. Kamerschen relied on the broad "generalization" that "if demand falls, the more competitive the market is, the more the price should fall, the less the quantity should fall," in suggesting that the events of 1974–75 might be "evidence" of the "inauguration of a cartel." (Kamerschen Tr. 1367–68, 1370). But even he conceded "I don't mean to suggest that a cartel existed at the time period I want to focus on." (*Id.* at 1368).

236. Dr. Brozen explained that, far from being suspicious, the events of the period were fundamentally at odds with any hypothesis of collusion. The wide dispersion in the amount of output reductions (from 17% for Willamette to 46% for Crown Zellerbach) was inconsistent with a theory of collusion. (Brozen Tr. 2890–91; CX 708A; WX 1413 A-C). "[I]f there had been anticompetitive behavior the cutbacks among the various firms would have been similar in character." (Brozen Tr. 2890). The production of the largest firm, Willamette, declined less than that of the second, third, fifth, sixth and eighth largest producers. (CX 708A). As Dr. Kamerschen acknowledged, "if you are talking about collusion, you would normally not expect one of the top two or three firms to be one of the parties breaking up the collusion." (Kamerschen Tr. 1305).

237. Then too, it is important to note that non-west coast medium production declined more than west coast production (CX 652D, L; WX 1735 A-C), and there was an identical "stability" of OBM reported containerboard prices in the east, as compared to [76] that in the west. (CX 709F-J). An examination of production by medium mills in the Southern API region, during the same periods analyzed by complaint counsel for the west coast in CX 708, reveals the same deep production cutbacks and the same random variability among the largest producers. (Table III)

Table 3

Southern Medium Production By Company, 1973.4/1974.1 vs. 1974.4/1975.1

	1973.4/1974.1	1974.4/1975.1	% Change
International Paper	124,088	105.704	−15.0
Mead	113,513	71,389	−37.0
Weyerhaeuser	101,439	82,761	−18.0
Owens-Illinois	95,510	82,858	−13.0
Inland Container	86,564	86,868	− 0.4
Container Co. of Am.	86,093	57,237	−34.0
Continental Can Co.	80,288	54,396	−32.0
Great No. Nekoosa	65,823	51,672	−21.0
[***]	[***]	[***]	[***]
Firm Total	753,318	592,885	−21%
Balance of Reptg. Cos.	273,852	200,879	−27%
Total	1,027,170	793,764	−23%

Sources: Calculated from CX 612, CX 614–CX 616, CX 618 and CX 621.

238. In short, not only were the cutbacks in medium production and the stability of OBM prices of 1974–1975 nationwide phenomena, but they made good business sense. Since this was a period of drastically falling demand and inflationary costs (Findings 230–234), it made little sense for the companies to suffer greater losses by producing medium that they could neither sell nor inventory. (Findings 62–66). Nor did these market conditions offer hope of greater returns through price cutting. (*See, e.g.*, CX 407I, K, M). Accordingly, the market reaction which prevailed at that time is that which one would expect, even in a competitive industry.

b. *1981–1982*

239. The other period of production cutbacks referred to by complaint counsel began in the last quarter of 1981 and was connected with a similar drop-off in demand (although it did not [77] occur in the special environment of the discontinuation of price controls, as did the 1974–1975 decline). (CF 6–68, 6–69).

240. This weakening of demand began in the 4th quarter of 1981. (CF 6–68, 6–69; CX 155B-C; CX 157A; CX 163G). Again, the entire medium industry, both east and west, was forced to cut back on production. (CX 157B-D). The record shows that, at least in the west, the cut backs occurred on a random basis, with three of the west coast firms, Crown Zellerbach, Georgia-Pacific, and Longview Fibre, actually showing increases over the first three quarters of the year. The others varied from cutbacks of 10% to 44%, with Louisiana-Pacific taking the 44% curtailment. [*See* table in n. **, at pp. 99–100 RRB,

which complaint counsel have agreed is accurate (Oral Argument Tr. 24)]. Weyerhaeuser was about in the middle, with a 23% cutback, while Willamette, then the number 2 company on the west coast, was on the low side with a 10% cut back. (*Id.*). These figures hardly give evidence of a collusive curtailment.

241. Additionally, discounting was increased at this same time, as was noted in Finding 228 above. For example:

a. As early as September 1981, Thacker Container purchased 26-pound medium at $319.23 (supplier unidentified). Thacker consistently made purchases at this price throughout 1981.4. (WX 1200ggg A3–A7).

b. From September to November 1981, California Paperboard, a non-integrated west coast producer sold 26-pound medium to Corru-Kraft Co. at $315. (WX 1200t Z, A23–A24).

c. In October 1981, Abbey Corrugated purchased 26-pound medium from [***] from Louisiana-Pacific, another integrated west coast producer, for $290; and from LaBoiteaux, a containerboard broker, for $295. (WX 1200a E IC, I, J).

d. Also in October 1981, Longview Fibre, an integrated west coast medium producer, sold 26-pound medium to Commencement Bay, a Tacoma independent, for $294.25. (WX 1200m G).

e. By December 1981, California Paperboard had lowered its price to Corru-Kraft from $315 to $290. (WX 1200t Z, A23). [78]

f. In December 1981, Louisiana-Pacific reduced its price to Abbey from $290 to $270. (WX 1200a I).

g. In January 1982, International Paper, an eastern producer, reduced the price to Crockett Container Corp. to $290. (WX 1200u R).

242. This evidence directly conflicts with complaint counsel's contention that there was "considerable delay" in the decline of prices on the west coast in 1981–1982. (CF 6–72, n. 1).[26] Such evidence also indicates that the 1981–1982 curtailments were not collusive.

243. Just as in the case of the 1974–1975 production curtailments, the cut backs of 1981–1982 were a nationwide phenomenon which were dictated by sound business judgement. Again, it would make little sense for these companies to produce medium they could neither sell, nor inventory. (Findings 238–239, 237).

[26] It is interesting to note that complaint counsel cite to WX 1200hhh D-E to support this contention. Those pages show Louisiana Pacific selling to Tharco Industries at $320 ($4.25 under OBM) from October through April 1982 and reducing its price to $280 in May 1982 and $270.00 in July 1982. However, pages B and C of that exhibit show this corrugater buying the bulk of its needs from Longview Fibre at $294.25 for the entire period July 1981 through September 1982—a price $30.00 under the OBM price. (WX 1200hhh B-C).

c. *Allegations of Other Production Curtailments*

244. Complaint counsel state that market related downtime is "not uncommon" on the west coast. (CF 7–5, n. 2). However, the record is devoid of evidence of any production cut backs in the west coast medium supply other than those in 1974–1975 and 1981–1982. The most complaint counsel have been able to show is that "[s]ome medium mills have taken downtime during March [1980] due to a lack of orders" (CX 148C), and a number of references to the possibility of taking market-related downtime in some internal Weyerhaeuser planning documents. (CF 6–66). This is hardly evidence of a history of market related curtailments designed to increase or maintain prices in the market. **[79]** Moreover, the testimony of Messrs. Waechter and Presson is uncontradicted that Weyerhaeuser has taken market-related downtime only twice in their respective 17 and 19 years experience with that company. (Waechter Tr. 1715; Presson Tr. 1600–01).

2. The Volatility of Containerboard Prices

245. Dr. Kamerschen suggested that there has been a "fairly stable pattern" of containerboard prices, in absolute terms, on the west coast and, in relative terms, compared to eastern prices. His comments were based on a review of OBM reported prices (CX 710A-D), which complaint counsel requested him to assume were representative of the actual transaction prices in the marketplace at the time they were published. (Kamerschen Tr. 1378–83, 1247–48, 1509). While OBM may be an indicator of long term trends in containerboard prices (Brozen Tr. 2839), the record reflects that OBM reported prices are not a reliable basis for measuring the economic significance of the volatility or variability of containerboard prices at any specific point in time. As Dr. Brozen explained, that requires an analysis of actual transaction prices because "it has always been found that the transaction prices are more volatile than the list prices which are usually reported" by organizations like OBM. (Brozen Tr. 2895). [(*See also* Kamerschen, *Antitrust Alchemy; Liquid Asphalt to Black Gold,* 9 North Carolina L. J., 178, 185 (1978) ("And it is these actual transaction prices and not list or book prices that are of major concern to an economist.")]

246. OBM reported prices are based on unspecified contacts by OBM with unidentified independent box producers (Kamerschen Tr. 1516); prices are not reported to OBM by producers. (Johnson Tr. 504; Wollenberg Tr. 590–91; Campbell Tr. 701; Cassidy Tr. 801 IC; Diforio Tr. 2130). OBM expressly disclaims that its reported price portrays the range of transaction prices at any given time:

The prices tabulated here are intended only as a reference standard to the current levels commonly prevailing in a representative proportion of U.S. contract transactions, as announced to customers by major board producers. The prices listed do not connote any agreement or commitment by any producer to sell material at the price indicated, or at any price predicated on the price listed. Transactions may be concluded at any time at [80] any price agreed upon by seller and purchaser. (WX 1508 A–4).[27]

247. Dr. Kamerschen could not quantify the relative accuracy of OBM reported prices to actual transaction prices. (Kamerschen Tr. 1509). He did not review any of Weyerhaeuser's trial exhibits (*Id.* at 1429), although they included actual transaction data from independents on the west coast. (WX 1200a A-A24 part IC; WX 1200b A-F part IC; WX 1200h A-A15; WX 1200m A-L; WX 1200t A-A24 part IC; WX 1200u A-Z; WX 1200bb A-A494 part IC; WX 1200cc A-Y; WX 1200uu A-D; WX 1200ggg A-A15; WX 1200hhh A-I; WX 1225 A-A47).

248. The actual transaction price evidence indicates that prices are considerably more volatile and variable than a review of OBM prices suggests. Medium prices on the west coast appear to be more volatile in periods of declining demand (Kamerschen Tr. 1370; Brozen Tr. 3320–21), as seen from the downward price movements on the west coast in late 1981-early 1982 from around $320 to around $270. (Findings 228, 241). During that same period, OBM was reporting a $324.25 west coast medium price; it was not until July 3, 1982, that OBM noted the availability of "$20 a ton" discounts ($304.25) and not until December 4, 1982 that it reported "$50 per ton" discounts ($274.25). (WX 1508 Z, A–1).

249. As Mr. Waechter of Weyerhaeuser explained, the accuracy of the OBM price "depends a bit on the economic conditions that prevail. Right now, it's probably grossly inaccurate." (Waechter Tr. 1701). The other industry witnesses also consistently testified that the accuracy of the OBM reported price depends on the state of the market. In periods of weak demand, it is "not very accurate." In periods of strong demand the OBM price is "fairly close." (Johnson Tr. 463–64, 505; Wollenberg Tr. 591–92; Campbell Tr. 662, 666, 702; Cassidy Tr. 801–02 IC; Diforio Tr. 2130; Perry Tr. 2350). [81]

250. In any event, volatility is relative. Dr. Kamerschen did not suggest any benchmark. Indeed, he has recognized that competitive performance does not require price changes to reflect every transitory fluctuation in cost and demand:

[E]ven if competition was more flexible in terms of price changes, it could be argued that it is possible to have too much of a good thing. Who wants to live in an economy where the slightest change in demand or supply produces hair-trigger changes in price?

[27] Thus, OBM prices do not even purport to show prices on the spot market, let alone the prices of each medium producer. (*See, e.g.*, WX 1200b, C-D; WX 1200h D-A13; WX 1200hhh B-C; F, H, I; for evidence of spot market sales).

Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics*, 27 Mercer L. Rev., 1061, 1084–86 (1976).

There, Dr. Kamerschen quoted Dr. Scherer's observation:

My personal opinion is that moderate price rigidity is more likely to have a stabilizing than a destabilizing influence on the economy. Still for the most part the advantages and disadvantages seem to offset one another, so that on balance it may make little difference whether prices are rigid or flexible within the range of variation encountered in ordinary experience. F. Scherer, *Industrial Market Structure and Economic Performance* at 318 (1970).

251. Just as there does not appear to be anything anticompetitive reflected in the degree of volatility of west coast medium prices over time, there is likewise nothing of competitive concern about the relationships between medium and liner prices or between western and eastern prices. (Brozen Tr. 2895–97). The actual transaction evidence in the record establishes that there is again more volatility in the price relationships than the OBM reported prices would suggest (Findings 228, 241; *See also,* RF 634), but there is good reason for the prices to be strongly correlated in any event.

252. The fact that medium and liner prices tend to move together reflects their fundamental and undisputed complementarity. (Findings 152–155). Likewise, the fact that all medium prices, east and west, tend to move together, (as do liner prices) is explained by the fundamental competitive interrelationships between eastern and western production detailed earlier. (Findings 133–151, 169–182). As Dr. Brozen [82] summarized, any temporary pricing "disequilibrium" is corrected by the potential for increased or decreased shipments from the lower cost southern and north central producers to the west coast:

You would be getting the equilibrating flows, as we have already talked about, the 17 mills in the east who are already shipping to the west coast.

So there are flows already occurring and if there were any attempt to hold the west coast price above a competitive level, those flows would increase and bring it into equilibrium. (Brozen Tr. 3367).

253. These pricing trends and competitive relationships only serve to confirm that medium production can most properly be viewed in the context of a national market. As Dr. Brozen explained, "in the national market you would expect that the prices would move similarly in different parts of the country." (Brozen Tr. 3205).

3. Past Antitrust Violations

254. Complaint counsel refer to price fixing involving corrugated sheets and corrugated containers (the end products into which medium is incorporated) in the eastern region of the United States and point out that Weyerhaeuser and other companies with west coast medium mills were involved. (CF 6–36 through 6–38). Although complaint counsel admit that the prior litigation did not involve medium, or the west coast area, they refer to such litigation as evidence of a tendency on the part of Weyerhaeuser and other west coast medium manufacturers to engage in collusion. (CF 6–36 through 6–38). While past anticompetitive conduct can, in the proper case, be considered as evidence of the likelihood of similar future conduct (CB at 226–227), it also might be a deterrent to future similar conduct, especially in instances such as the prior litigation referred to here, where the cost of that conduct was so high. (CF 6–37). Thus, this argument can cut both ways. In any event, the past history of violations here, involving other [83] products in other parts of the country, have little probative value in view of my other findings hereinabove.[28]

4. Nationwide Containerboard Pricing Trends Cannot Be Explained By a West Coast Medium Collusion

255. The events of 1974 and 1975 and the historical relationships between medium and liner prices, east and west, do not square with a theory of collusion among west coast medium producers. The same circumstances would apply to eastern producers as well. Given the number and size distribution of containerboard producers, a nationwide conspiracy hypothesis would be undercut at the threshold by Dr. Kamerschen's own testimony regarding the connection between concentration and collusion. (Brozen Tr. 2893–95). As Dr. Brozen observed, it "would be very odd indeed" for collusive west coast medium prices to move together with competitive liner and eastern medium prices. "I would expect price in the collusive medium market to move in ways different from the way they move in the three competitive markets." (Brozen Tr. 2895–96).

G. *Some Other Issues*

256. Several other issues are argued in the proposed findings and briefs of the parties, which, although they play no part in my decision in view of the above findings, do merit some discussion.

257. As complaint counsel contend, the demand for corrugating

[28] Another factor to be considered in this regard is the localized nature of the geographic market in the case of corrugated sheets and corrugated containers, as compared to the much wider geographic market within which competition occurs in the medium industry. (Cassidy Tr. 873; Presson Tr. 1545–46; WX 1102 Q; CX 22A; CF 2–51, 2–52; Compare with Findings 31–69, 85–117).

medium is very inelastic. (CF 6–7, *et seq.*). A rise or fall in the price of medium has little effect on the quantity sold. (Waechter, CX 64Z59, Z62–Z63; Presson, CX 55Z55–Z56; Johnson, CX 63D, Z105; Howard Tr. 2079–80; Campbell Tr. 688–89; CX 407M; WX 1505A; CX 102R, U; Brozen Tr. 2939). In fact the demand for corrugated containers is itself relatively inelastic. (CX 187G; CX 407P; CX 107Z7; CX 44E; CX 601G; CX [84] 602E; CX 603J; CX 604P; CX 606M; CX 607B; Lamm Tr. 1009–10; Nordstrom Tr. 1142–44; Presson CX 65Z56).

258. Corrugating medium is a relatively homogeneous product. Although it comes in a number of basis weights and there are some specialty grades (Findings 25, 29), the vast majority of the medium produced and used is "regular" 26 pound and "regular" 33 pound medium. (Finding 29). Other than meeting minimum quality standards and an occasional runability problem with the medium of a particular mill, box producers are generally indifferent as to which mill or producer supplies their medium. (Campbell Tr. 665; Sanzone Tr. 1809; York Tr. 1938; Aitchinson Tr. 2028–29, 2053; Howard Tr. 2065–66; Price Tr. 2206; Perry Tr. 2353; Presson, CX 65Z18–Z19; Brundage JX 5E).

259. The growth in demand for medium is closely tied to the growth in demand for corrugated containers, since medium is used almost exclusively in the production of corrugated containers. (Finding 22). Demand for corrugated containers has grown and is expected to grow at about the same rate as overall economic activity, as measured for example by GNP. (Campbell Tr. 698; Wollenberg Tr. 631; Waechter Tr. 1654; Kamerschen Tr. 1351; Duffie, JX 3D; CX 25B; CX 107Z2; CX 108F; CX 109Z27, Z28; CX 120L; CX 152Z5 IC; CX 171X IC; CX 180Z1, Z29; CX 185I IC; WX 1713A). Such a growth rate is expected to increase corrugated container demand, and consequently medium demand, by only a few percentage points per year. (CX 67E; CX 18F IC; CX 427Z35 IC).

260. There has been a long term decline in the real price of medium. Containerboard prices as reported by OBM, including the price of medium on the west coast, have fallen, in real terms (*i.e.*, adjusted for inflation), since at least 1966 according to a number of recognized indices, including the Producer Price Index. (WX 1706–1710).

261. Lastly, Menasha was not a significant net seller of medium on the west coast when it owned and operated the North Bend mill. The parties have stipulated that in 1979, Menasha sold only "4.2 percent of the production of the North Bend mill . . . on the open market." (CX 651, Stip. 12). According to Richard L. Johnson, the Chief Executive Officer of Menasha, this level of sales had remained approximately the same for the six previous years. (Johnson JX 6 I). Even more significant, Mr. Johnson testified that, as a matter of company policy,

Menasha sought to match its mill capacity to the requirements of its own box plants; that is, it did not have a net seller strategy. (Johnson JX 6 I-J). [85]

X. FAILURE OF PROOF

262. In view of the above findings, and based upon a careful review of all the evidence, I find that complaint counsel have failed to prove by the weight of the evidence that Weyerhaeuser's acquisition of Menasha's North Bend, Oregon medium mill may substantially lessen competition in any line of commerce in any section of the country, or tend to create a monopoly.

XI. DISCUSSION

This case presents some difficult choices.[29] At first I was inclined to accept complaint counsel's position and find a west coast medium market with an HHI in the "moderately concentrated" range, an increase in the HHI of over 100 as a result of the acquisition, and other factors existing which indicated a violation. However, in trying to support that position, I was faced with a number of facts of record which just wouldn't fit into that mold. Among the factors causing me the most concern were: (1) The lock-step pricing pattern between western and eastern medium and between medium and liner in this industry; (2) The very substantial presence on the west coast of those eastern medium producers with western box shops; and (3) The ability of these and other eastern mills to ship medium west on a profitable basis.

Market definitions are critical to the decision in this matter. On the product market question the evidence, on balance, indicates that corrugating medium is the relevant product market for purposes of analyzing this acquisition. (Findings 155–167). However, a number of facts blur this determination to a certain degree. They are: (1) Liner is easily tradeable for medium (Finding 90); (2) Medium and liner prices show a close price relationship (Finding 171); (3) Some "swing" mills can produce either medium or liner on the same [86] machines (Findings 81–82); (4) Other liner machines can be converted to the production of medium, although the record indicates there would be some inefficiencies in such conversion (Findings 75, 162); and (5) Medium and liner are constituent parts of corrugated sheets and boxes, with medium having no substantial separate usage. (Findings 22–23).

The geographic market definition is similarly complex. Only a few percentage points of the medium produced in the 11 west coast states

[29] Both complaint counsel and respondents' counsel are to be commended for the excellence of their evidentiary presentations, proposed findings and briefs. Both parties were quite economical in the marshalling of evidence during the hearing, and avoided "overtrying" their respective positions.

are shipped out of that area (CX 953A) and, as of 1982, only about 10% of the medium consumed in those 11 western states was produced outside of that area. (Finding 137). However, these facts were complicated by, among other things, evidence that: (1) Nine producers of liner and medium, other than the west coast medium producers, have a very substantial stake in the west coast medium market, since they must protect their interests in maintaining the production of their box shops and liner mills (Findings 128–129, 142, 145–154); (2) Eastern medium producers have, throughout the period covered by the evidence, found it profitable to ship medium to the west coast, both to supply their own box shops and for sales on the open market (Finding 135); (3) The lock-step pricing, over the years, of west coast medium and eastern medium reveals a strong competitive relationship between the two (Findings 121–123, 170–177); (4) Exchange agreements, which account for a substantial portion of medium sales, act as a surrogate for shipments west by eastern producers having western box shops (Findings 142–146, 174–175); and (5) Western producers of liner, but not medium, who have box shops on the west coast can readily exchange liner for medium from eastern suppliers to keep their box shops adequately supplied. (Findings 90–91, 152–154, 148–150).

The Product Market

I have found the relevant product market to be corrugating medium only. (Finding 167). Although liner is a "complementary" product, is easily tradeable for medium, and is essential to the use of medium (since it takes both to make a corrugated sheet or box), it is not a part of the relevant market in this matter. It is not a reasonable substitute for medium in the manufacture of corrugated sheet and boxes (Finding 156) and the production facilities are reasonably interchangeable only to a very limited degree. (Findings 159–165). Thus, there is no potential demand-side substitute for medium and the supply-side cross-elasticity is very low. Under the Commission's *Statement Concerning Horizontal Mergers* (hereafter *Statement*) this indicates that corrugating [87] medium is a separate product market from linerboard. [Trade Reg. Rep. (CCH) No. 546, 70, 84 (June 16, 1982)]. Additionally, the relevant product market for corrugating medium is distinguished by several of the *Brown Shoe* criteria as well.[30] First, there is widespread industry recognition that medium constitutes a separate and distinct market as shown by the market analyses of Weyerhaeuser, Menasha, and International Paper, and by the trade association data collected and published by the American Paper Institute and the *Official Board Markets* publications. (Finding 166). Sec-

[30] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

ondly, medium clearly has peculiar characteristics and uses. Other paper products lack the characteristics of medium and, therefore, cannot be economically or practicably substituted for medium as the fluted inner layer in corrugated board. (Findings 33, 156). Third, medium is made by a distinct production process using unique production facilities. Medium is not made from the pulp used to produce kraft linerboard or other paper products, and supply-side flexibility between medium and liner is very limited. (Findings 72–74, 159–165). Lastly, medium sells at a different and distinct price from other paper products. (Finding 171; CX 709).

The Geographic Market

As noted in *Brown Shoe v. United States*, 370 U.S. at 336–37, the geographic market selection must "both 'correspond to the commercial realities' of the industry and be economically significant." The commercial realities in this case are somewhat blurred, due to the peculiar characteristics of this industry. Thus, complaint counsel, looking at shipping patterns, the existence of a price difference on the west coast, shipping costs and alleged industry recognition, have concluded that the relevant geographic market consists of the 11 states of the west coast region. (CF 3–18 through 3–44; CB at 181–191). However, in doing so complaint counsel have failed to recognize certain "commercial realities." The shipping patterns of the medium industry are largely the result of the trade arrangements under which this industry operates, rather than of economic necessity. (Findings 141–151). The price differential reveals a close competitive relationship between western medium and that produced in the rest of the nation, rather than indicating a separate market. (Findings 121–123, 171–182). Shipping costs [88] have not discouraged shipments from east to west, nor made such shipments unprofitable in the past. (Findings 133–140). And the alleged industry recognition is quite illusive. For example, *OBM* divides the country up into five separate areas, New England, Middle Atlantic, South and South Central, North Central and West Coast, but there is no price difference among the other four regions and even complaint counsel have not contended that they are separate market areas. (*See, e.g.*, CX 625A). As for the internal documents of Weyerhaeuser, upon which complaint counsel also rely in part to show the west coast as a separate market area, some of these documents include eastern medium producers in the "West Coast" industry. (*See, e.g.*, CX 1A; CX 26Z).

In the Commission's *Statement*, the issue of geographic market is defined as "whether producers of the merged firm's product in other geographic areas place a significant restraint on the ability of the merged firm to raise price or restrict output." [Trade Reg. Rep. (CCH)

No. 546, at 84–85 (June 16, 1982)]. The Justice Department *Merger Guidelines* (hereafter *Guidelines*) similarly state, "The goal of market definition is to identify and consider all the firms that would have to cooperate in order to raise prices above the competitive level and keep them there." [Trade Reg. Rep. (CCH) No. 546, at 61 (June 16, 1982)].

In keeping with these principles, I have reviewed the evidence of record to determine what effect, if any, firms outside the 11 western states exert on the production and sale of medium within that area. When viewed in this light, it is quite clear that eastern firms, especially those with box shops in the west, have a definite competitive effect on west coast medium.

Simply looking at the pricing history of this industry is almost enough to convince one that the eastern and western medium prices are competitively inter-related. The price differential between eastern and western medium was only $4.25 for most of the time period covered by the evidence (with liner selling at the same price, east and west). Even when it rose to $34.25, it still did not cover the equilibrium transportation cost for most eastern companies. (Findings 121–123). Such a narrow price differential, not even covering transportation costs, cannot be explained by complaint counsel's contention that the west coast producers look to eastern prices and liner prices as "reference points." (Finding 171). The only reasonable explanation for the narrowness of that differential [89] is that eastern prices do exert a competitive influence on western prices. (Findings 172–182).[31]

This explanation becomes even more apparent when the mechanisms by which this industry operates are reviewed. The two principal factors to be considered are: exchange agreements and box shop operations [the root source of profits for the integrated containerboard company (Finding 186)].

Exchange agreements are a very important factor in the production, transportation and sale of medium. In addition to providing reduced freight rates in some instances, they allow medium mills to maximize "trim" efficiencies (permit grouping of orders together to lower trim loss and maximize production of trim widths that result in low trim loss), foster mill optimization by allowing longer production runs of one grade or basis weight, and enhance the efficiencies of the box shop operations. (Findings 92–98). The vast majority of medium consumed on the west coast is either used internally in the

[31] The relationship between medium and liner prices on the west coast can be similarly explained by the interrelationship of containerboard production and pricing on a nationwide basis. The evidence shows the same basic relationship between western and eastern liner, with western and eastern liner priced identically throughout most of the evidential period, and increasing by $30.00 in the west at the same time the medium differential increased by $30.00. (CX 709A-Z2). Again, the stability of the east-west price differential, over time, shows a definite competitive relationship between east and west producers.

box shops of the producers, or purchased through exchange agreements. (Findings 88, 131). Thus, the eastern medium producers with western box shops, in normal market circumstances, rely on such exchange agreements for most of the supply of medium to their western box shops. (Findings 142–143). However, this is by no means the only available source of supply for such box shops. These eastern producers have generally always supplied some of their own needs at the western box shops and in times of curtailed western production due to strikes have supplied up to 100% of their needs from their eastern mills. (Findings 135, 142–143). **[90]**

The box shops are a very important element of the integrated containerboard companies and the record shows a determination on the part of such companies to keep their box shops adequately supplied with medium and liner. (Findings 142–143, 145–148). This is due in great part to the fact that the profit for such integrated companies is primarily made at the box shop end of their operations. (Findings 104, 186).[32] Therefore, it is highly unlikely that the eastern mills with western box shops would allow any collusive curtailment of their medium supply. (Findings 142–148). Further, it must be remembered that any abrogation of the trade agreements by western medium producers would result in similar treatment for many of those producers at their box shops in the eastern portion of the country. (Finding 145). Moreover, the western companies could not curtail the medium supply at only their own box shops and those of the independents, without forfeiting market share at the box shop level (the profit level) to the box shops of the eastern mills. (Finding 174).

Nor could west coast colluders even expect to limit medium supply to the independent box shops. Eastern mills, including a number not having box shops on the west coast, have been and are supplying medium to the open market on the west coast. (Finding 133). The evidence shows, further, that they are willing and able to supply additional medium there, in the event a demand exists. In fact, they have been soliciting additional sales in that area in recent years. (Findings 177, 181). The record also shows that sufficient excess capacity exists in the east to supply any increased demand in the west. (Finding 150). Furthermore, the evidence indicates that past sales on the west coast by eastern suppliers, at competitive prices, have been profitable ones. (Findings 136, 148, 215).

As stated in *Jim Walter Corp. v. F.T.C.*, 625 F.2d 676, 682 (5th Cir. 1980) ". . . the most compelling evidence that an area is competitively unified is statistical evidence of pricing interdependence. . . ." Com-

[32] The record also indicates that west coast box shops may be much more profitable than those in the rest of the nation, due to the high percentage of "produce" box business there. (CX 26C). This, of course, adds extra incentive for eastern companies to maintain the highest possible production at their west coast box plants.

mentators such as Professor Elzinga, and Areeda and Turner agree that correlation of price movements [91] in different areas is a strong indication of a single market. Elzinga, *Defining Geographic Market Boundaries*, 26 Antitrust Bull., at 746 (1981); Areeda & Turner, *Antitrust Law* ¶ 522 at 355 (1978). This is particularly borne out by the language of Areeda and Turner, who state

> When prices and price movements in two territories are closely correlated, a single market definition is strongly indicated . . . Indeed, price identity is not a necessary element; high correlation of the direction and amount of price changes would ordinarily be enough. (¶ 522 at 355).

In this regard it must be remembered that even when the E-W Differential was widened to $34.25, the eastern producers were attempting to raise their prices by the same amount and that eventually they did succeed in raising their prices somewhat, thus drastically reducing the differential back toward the traditional level. (Findings 123 n. 11, 179).[33]

In any event, the prices and price movements of medium (and liner) have shown a very close correlation, historically, between the west coast and the rest of the nation (Findings 121–123), so much so, that even complaint counsel have referred to west coast medium prices as moving in "lock-step fashion" with western liner and eastern medium prices. (CRB 1–4). Such "lock-step" price movements cannot be explained by the contention that west coast producers use eastern prices and liner prices as "reference points," since then the western medium prices would surely be set higher. (Finding 171). Nor is there any other logical explanation available from the evidence concerning such pricing pattern, other than the one showing a competitive interrelationship with the eastern mills already shipping to the western market; particularly those with box shops located there. [92]

Characteristics Of A "Western Market"

If I were to conclude, despite the above evidence, that the 11 west coast states did constitute the relevant market, I would still have to dismiss this complaint. The evidence reveals not only that such a market would not be as concentrated as is claimed by complaint counsel, but also, that: (1) entry barriers are very low, especially for eastern mills and through the expansion of production by western mills (including, particularly, western swing mills); (2) there has been no appreciable trend toward concentration in that "market" up to the

[33] In fact, the $10–14 E-W Differential which came into effect in the spring of 1983 (Finding 123 n. 11) is not too unlike the differentials between Menasha's eastern and western prices, on a transaction price basis, even before the E-W Differential widened in 1980. (*See* CX 719). It must be remembered that transaction prices are not always identical to *OBM* prices and that, for some companies at some times, the actual transaction prices might reflect a different price differential between east and west. (Finding 120 n. 9).

time of this acquisition; and (3) the "market" has shown a great deal of volatility in market shares in the recent past. (Findings 195–225, 226).

West Coast Market Shares

Even complaint counsel would include some sales by eastern companies in their computation of market shares. In doing so, whether on the basis of "consumption" or capacity, they have included eastern mills only to the extent those mills have shipped medium into the market in recent years. (CF at pp. 67, 69; CX 702 part IC; CX 703, part IC). This certainly understates their presence in the market. Those eastern mills with western box shops have already shown the determination to supply up to 100% of the needs of their box shops if the need arises (Findings 135, 142–143), and the eastern companies, in general, have shown a willingness to supply additional medium to the open market in the west. (Findings 133, 177, 181). Although the importance of sales to the open market by eastern mills and paper brokers is difficult to measure, other than in terms of past sales, it is simple enough to measure more accurately the real presence of those eastern mills having western box shops. Since they have demonstrated their ability and determination to supply their own medium needs if necessary, they should be included in the market at least to the level of capacity needed to meet such needs. Such inclusion is consistent with the Justice Department *Guidelines* which would "include . . . those sales likely to be made or capacity likely to be used in the geographic market. . . ." (*Guidelines*, at 25).

Furthermore, the use of "consumption" figures by complaint counsel (CX 702, part IC) also distorts the concentration figures for a west coast "market." Not only does such use ignore substantial idle capacity on the west coast with which [93] potential colluders would have to contend in the event of a conspiracy to curtail production, but it also ignores the true impact of eastern producers and the liner market upon west coast medium sales.

Capacity is the preferable measure of market share in this case, since it more accurately reveals the problems any potential colluders would have in curtailing west coast medium sales. The dissymmetries of interests of the participants in this "market" are better reflected by capacity (Findings 124–129, 152–154) and such differences would have to be considered and controlled by colluders, if any conspiracy were to be successful. The failure to control all of the capacity available to the "market" would only result in forfeiture by the colluders of market share at the very important box shop end of the market, since the eastern producers, and those western companies concerned principally with liner, could supply all the needs of their own box

shops and, consequently, take up any slack in the market at considerable expense to the colluders. (Finding 186).[34]

Thus, I have calculated market shares on the basis of capacity and have included the capacity of eastern medium producers with western box shops to the extent necessary for the supply of those box shops in the event of a collusive curtailment of supply on the west coast.[35] This is a very conservative approach since it fails to completely account for the ability of these eastern producers, and others, to supply even greater quantities of medium to the west coast box shops. (Findings 189–192). However, it is sufficient for the purposes [94] of this case, since it reduces the concentration level below the critical level of the *Guidelines*. In this regard it should be noted, however, that legal precedent requires that the market should include all sellers "to which the purchaser can practicably turn for supplies." *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 359 (1963); *Tampa Electric Company* v. *Nashville Coal Co.*, 365 U.S. 320, 327–28 (1961); *In Re Uranium Antitrust Litigation*, 556 F.Supp. 806, 807 (N.D. Ill. 1983). To the extent my calculations do not do so, they overstate concentration within a west coast medium "market."

When I have recalculated market shares in keeping with the above factors, the post acquisition concentration in the west coast "market" falls below the critical level of the Justice Department *Guidelines*. The resulting post-acquisition HHI is only 952.02, showing an increase in pre-acquisition HHI of about 150 points. (Finding 191, Tables 1 and 2). For acquisitions in this range the *Guidelines* provide that:

> Markets in this region generally would be considered to be unconcentrated. . . . Because implicit coordination among firms is likely to be difficult and because the prohibitions of Section 1 of the Sherman Act are usually an adequate response to any explicit collusion that might occur, the Department is unlikely to challenge mergers falling in this region. (*Guidelines*, at 29).

Accordingly, the concentration figures in this case would not support the finding of a violation even if it were determined that a west coast market existed. This becomes even more apparent when the question of entry barriers is considered below.

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[34] I refer to liner producers in this regard because their liner is readily exchangeable for medium. Moreover, two of the western companies who are proportionally more involved in liner production than in medium production have substantial "swing" capacity which can be converted to medium production. (Findings 82, 222).

[35] I have used 1982 capacity figures in my calculations since the consumption data for the west coast box shops of the eastern producers is only available for that year. Further, substantial capacity has been added to the North Bend mill by Weyerhaeuser, since the acquisition, which would be missed in the data for prior years.

Entry Barriers

The Commission, in its *Statement* has said that "perhaps the most important qualitative factor" in determining the impact of a merger is "the issue of entry barriers." *Statement,* at 76–77. The evidence in this case reveals that entry barriers are low, at least for eastern producers and for non-colluding western producers who might wish to expand their production (especially those with "swing" mills). In this regard, all potential sources of additional supply to west coast medium consumers must be considered, not just *de novo* construction on the west coast. The Commission has indicated in its *Statement* that "[e]vidence of substantial expansion by firms already in an **[95]** industry" is relevant to the question of entry barriers. *Statement,* at 77.

Moreover, even the evidence concerning the possibility of *de novo* construction does not indicate the existence of high barriers to entry. "The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'. . . ." Areeda & Turner, *Antitrust Law,* ¶ 409(e) at 303. When the necessary expenditures for *de novo* construction in this industry are viewed in light of the size of the companies involved, their propensity for capital expenditures in the past, the availability of financing, and the fact that there are actual plans for expansion extant in the industry, it is clear that there are no real barriers to *de novo* construction in this industry on the basis of capital costs. (Findings 196–200).

Nor does there appear to be a lack of potential mill sites as claimed by complaint counsel. Although there may be a shortage of mill sites on the west coast for semichemical mills, there is no reliable evidence showing the lack of mill sites for recycled mills on the west coast. (Findings 206–208). Furthermore, the evidence indicates that there is no shortage of mill sites for semichemical mills in the southeast and midwest (Finding 206), which the record also shows are low cost areas as compared to the Pacific Northwest. (Finding 215).

Additionally, the high capital cost of a new mill would not impede its ability to compete for the west coast medium business, as asserted by complaint counsel. (Findings 209–211). The evidence shows that, at startup, a new mill on a total cost basis would have a lower cost than the average mill in the industry and would most likely have a lower cost than the west coast mills. (Finding 209). Moroever, the record shows that variable cost is the most appropriate criterion for measuring the cost effectiveness of a new mill in this industry. (Findings 210–211).

Most importantly, complaint counsel's discussion of barriers to entry does not consider the possibility of expansion by firms already in the industry. A substantial number of eastern mills (21) already

have a presence in the market, especially those having box shops in the west. (Findings 133, 142–150). A number of these have shown a desire to expand their presence on the west coast, by their solicitation of additional sales in recent years. (Finding 181). The fact that they have been able to sell profitably on the west coast at competitive prices and on competitive service terms in the past, even with the very low [96] E-W Differential, is proof that transportation costs are not a barrier to such entry. (Findings 135–136, 148, 181). This circumstance is undoubtedly explained by the lower costs enjoyed by some of the eastern producers. (Finding 215). As noted in *RSR Corp.*, 88 F.T.C. 800, 882 (1976), "[a] larger, more efficient plant can ship its output further . . . because lower unit production costs permit absorption of larger freight costs."

Expansion of the presence of other western mills is also a very likely form of entry in this instance. The record shows a history of expansion, as well as the opportunity for further substantial expansions, by most medium mills, east and west. (Findings 150, 218–219). It is highly unlikely that all west coast medium producers would join in any collusion to curtail production on the west coast. (Findings 217, 219). A number of the smaller firms have shown aggressiveness in pricing in the recent past and might be expected to compete for any demand created by a collusion to curtail production in this area. (Finding 219).

The potential for expansion by western mills is further enhanced by the existence of "swing mills" there. If medium prices were to rise relative to liner prices on the west coast, it is likely that some substantial portion, at least, of this "swing" capacity would be utilized for the production of medium. (Findings 220–225).

Furthermore, considering the possibility of expansion by some western mills, or increased penetration by eastern mills, it is important to note that these firms would not have to supply the entire market in order to defeat any west coast collusion. Due to the small size of the open market and that portion of the market represented by the box shops of the eastern producers, they would only have to supply enough additional medium to the market to allow such box shops to operate at full potential so as to fulfill whatever demand was created by the collusive curtailment. (Findings 131, 186). The collusion would then necessarily fail, because the colluders could not afford to sacrifice market share at this important end of the market. (Finding 186).

In the absence of significant entry barriers, it is "unlikely that market power, whether individually or collectively exercised, will persist for long." *Statement,* at 77. The Justice Department *Guidelines,* for instance, specifically provide that ease of entry alone may

be a sufficient reason not to challenge a merger. *Guidelines,* at [97] 31. Even if this market were "moderately concentrated," as contended by complaint counsel, the absence of entry barriers, when considered along with the other competitive facts discussed above, would therefore preclude a finding that this acquisition tends to injure competition.

Market Share Volatility And Concentration Trends

Two other factors which the Commission's *Statement* indicates are measures of market power resulting from an acquisition, are the volatility of market shares and concentration trends. *Statement,* at 76. In this instance, each of these criteria favors the acquisition. The market shares of the western medium producers in a "west coast market" have been very volatile in recent years (Finding 226) and the record reveals no substantial trend toward concentration, prior to this acquisition, over the period covered by the evidence. (Finding 226).

Determination

In view of all of the above, I must find that the weight of the evidence of record fails to establish that Weyerhaeuser's acquisition of the North Bend medium mill from Menasha may lessen competition or tend to create a monopoly, in any line of commerce in any section of the country.

XII. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondents Weyerhaeuser Company and Weyerhaeuser West Coast, Inc. (Weyerhaeuser) and the subject matter of this proceeding.

2. At all times material herein, Weyerhaeuser was engaged in the production and sale of corrugating medium in interstate commerce, its assets were used in interstate commerce, and it was engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and its business was in and affected commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

3. Complaint counsel have failed to sustain the burden of establishing by the weight of the evidence that the acquisition of the North Bend mill by Weyerhaeuser is a violation of Section 7 of the Clayton Act, or Section 5 of the Federal Trade Commission Act, as alleged in the Complaint. [98]

ORDER

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed.

APPENDIX I

(CX 709–A—Z–2)

OFFICIAL BOARD MARKETS
"The Yellow Sheet"

Announced Delivered Prices
for #26 Semichemical Corrugating Medium
and #42 Kraft Linerboard
1973–1981

1973 Prices

	Corrugating Medium		Linerboard	
Week	East	West	East	West
1/06/73	$126.00	$130.25	$134.00	$134.00
1/13/73	126.00	130.25	134.00	134.00
1/20/73	126.00	130.25	134.00	134.00
1/27/73	126.00	130.25	134.00	134.00
2/03/73	126.00	130.25	134.00	134.00
2/10/73	126.00	130.25	134.00	134.00
2/17/73	126.00	130.25	134.00	134.00
2/24/73	126.00	130.25	134.00	134.00
3/03/73	126.00	130.25	134.00	134.00
3/10/73	126.00	130.25	134.00	134.00
3/17/73	126.00	130.25	134.00	134.00
3/24/73	126.00	130.25	134.00	134.00
3/31/73	130.00	134.25	137.50	137.50
4/07/73	130.00	134.25	137.50	137.50
4/14/73	130.00	134.25	137.50	137.50
4/21/73	130.00	134.50	137.50	137.50
4/28/73	130.00	134.50	137.50	137.50
5/05/73	140.00	144.25	145.00	145.00
5/12/73	140.00	144.25	145.00	145.00
5/19/73	140.00	144.25	145.00	145.00
5/26/73	140.00	144.25	145.00	145.00
6/02/73	140.00	144.25	145.00	145.00
6/09/73	140.00	144.25	145.00	145.00
6/16/73	140.00	144.25	145.00	145.00
6/23/73	140.00	144.25	145.00	145.00
6/30/73	140.00	144.25	145.00	145.00
7/07/73	140.00	144.25	145.00	145.00
7/14/73	140.00	144.25	145.00	145.00
7/21/73	140.00	144.25	145.00	145.00
7/28/73	140.00	144.25	145.00	145.00
8/04/73	140.00	144.25	145.00	145.00
8/11/73	140.00	144.25	145.00	145.00
8/18/73	140.00	144.25	145.00	145.00
8/25/73	140.00	144.25	145.00	145.00
9/01/73	140.00	144.25	145.00	145.00

	Corrugating Medium		Linerboard	
Week	East	West	East	West
9/08/73	140.00	144.25	145.00	145.00
9/15/73	140.00	144.25	145.00	145.00
9/22/73	140.00	144.25	145.00	145.00
9/29/73	140.00	144.25	145.00	145.00
10/06/73	140.00	144.25	145.00	145.00
10/13/73	140.00	144.25	145.00	145.00
10/20/73	140.00	144.25	145.00	145.00
10/27/73	140.00	144.25	145.00	145.00
11/03/73	140.00	144.25	145.00	145.00
11/10/73	140.00	144.25	145.00	145.00
11/17/73	140.00	144.25	145.00	145.00
11/24/73	140.00	144.25	145.00	145.00
12/01/73	140.00	144.25	145.00	145.00
12/08/73	140.00	144.25	145.00	145.00
12/15/73	140.00	144.25	145.00	145.00
12/22/73	140.00	144.25	145.00	145.00
12/29/73	140.00	144.25	145.00	145.00

1974 Prices

	Corrugating Medium		Linerboard	
Week	East	West	East	West
1/05/74	$140.00	$144.25	$145.00	$145.00
1/12/74	140.00	144.25	145.00	145.00
1/19/74	140.00	144.25	145.00	145.00
1/26/74	140.00	144.25	145.00	145.00
2/02/74	140.00	144.25	145.00	145.00
2/09/74	140.00	144.25	145.00	145.00
2/16/74	140.00	144.25	145.00	145.00
2/23/74	140.00	144.25	145.00	145.00
3/02/74	140.00	144.25	145.00	145.00
3/09/74	140.00	144.25	145.00	145.00
3/16/74	160.00	164.25	165.00	165.00
3/23/74	160.00	164.25	165.00	165.00
3/30/74	160.00	164.25	165.00	165.00
4/06/74	160.00	164.25	165.00	165.00
4/13/74	160.00	164.25	165.00	165.00
4/20/74	160.00	164.25	165.00	165.00
4/27/74	160.00	164.25	165.00	165.00
5/04/74	160.00	164.25	165.00	165.00
5/11/74	160.00	164.25	165.00	165.00
5/18/74	160.00	164.25	165.00	165.00
5/25/74	160.00	164.25	165.00	165.00
6/01/74	160.00	164.25	165.00	165.00
6/08/74	160.00	164.25	165.00	165.00
6/15/74	160.00	164.25	165.00	165.00
6/22/74	160.00	164.25	165.00	165.00
6/29/74	190.00	194.25	195.00	195.00

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
7/06/74	190.00	194.25	195.00	195.00
7/13/74	190.00	194.25	195.00	195.00
7/20/74	190.00	194.25	195.00	195.00
7/27/74	190.00	194.25	195.00	195.00
8/03/74	190.00	194.25	195.00	195.00
8/10/74	190.00	194.25	195.00	195.00
8/17/74	190.00	194.25	195.00	195.00
8/24/74	190.00	194.25	195.00	195.00
8/31/74	190.00	194.25	195.00	195.00
9/07/74	190.00	194.25	195.00	195.00
9/14/74	190.00	194.25	195.00	195.00
9/21/74	190.00	194.25	195.00	195.00
9/28/74	190.00	194.25	195.00	195.00
10/05/74	190.00	194.25	195.00	195.00
10/12/74	190.00	194.25	195.00	195.00
10/19/74	190.00	194.25	195.00	195.00
10/26/74	190.00	194.25	195.00	195.00
11/02/74	190.00	194.25	195.00	195.00
11/09/74	190.00	194.25	195.00	195.00
11/16/74	190.00	194.25	195.00	195.00
11/23/74	190.00	194.25	195.00	195.00
11/30/74	190.00	194.25	195.00	195.00
12/07/74	190.00	194.25	195.00	195.00
12/14/74	190.00	194.25	195.00	195.00
12/21/74	190.00	194.25	195.00	195.00
12/28/74	190.00	194.25	195.00	195.00

1975 Prices

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
1/04/75	$190.00	$194.25	$195.00	$195.00
1/11/75	190.00	194.25	195.00	195.00
1/18/75	190.00	194.25	195.00	195.00
1/25/75	190.00	194.25	195.00	195.00
2/01/75	190.00	194.25	195.00	195.00
2/08/75	190.00	194.25	195.00	195.00
2/15/75	190.00	194.25	195.00	195.00
2/22/75	190.00	194.25	195.00	195.00
3/01/75	190.00	194.25	195.00	195.00
3/08/75	190.00	194.25	195.00	195.00
3/15/75	190.00	194.25	195.00	195.00
3/22/75	190.00	194.25	195.00	195.00
3/29/75	190.00	194.25	195.00	195.00
4/05/75	190.00	194.25	195.00	195.00
4/12/75	190.00	194.25	195.00	195.00
4/19/75	190.00	194.25	195.00	195.00
4/26/75	190.00	194.25	195.00	195.00
5/03/75	190.00	194.25	195.00	195.00
5/10/75	190.00	194.25	195.00	195.00
5/17/75	190.00	194.25	195.00	195.00

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
5/24/75	190.00	194.25	195.00	195.00
5/31/75	190.00	194.25	195.00	195.00
6/07/75	190.00	194.25	195.00	195.00
6/14/75	190.00	194.25	195.00	195.00
6/21/75	190.00	194.25	195.00	195.00
6/28/75	190.00	194.25	195.00	195.00
7/05/75	190.00	194.25	195.00	195.00
7/12/75	190.00	194.25	195.00	195.00
7/19/75	190.00	194.25	195.00	195.00
7/26/75	190.00	194.25	195.00	195.00
8/02/75	190.00	194.25	195.00	195.00
8/09/75	190.00	194.25	195.00	195.00
8/16/75	190.00	194.25	195.00	195.00
8/23/75	190.00	194.25	195.00	195.00
8/30/75	190.00	194.25	195.00	195.00
9/06/75	190.00	194.25	195.00	195.00
9/13/75	190.00	194.25	195.00	195.00
9/20/75	190.00	194.25	195.00	195.00
9/27/75	190.00	194.25	195.00	195.00
10/04/75	190.00	194.25	195.00	195.00
10/11/75	190.00	194.25	195.00	195.00
10/18/75	190.00	194.25	195.00	195.00
10/25/75	190.00	194.25	195.00	195.00
11/01/75	200.00	204.25	205.00	205.00
11/08/75	200.00	204.25	205.00	205.00
11/15/75	200.00	204.25	205.00	205.00
11/22/75	200.00	204.25	205.00	205.00
11/29/75	200.00	204.25	205.00	205.00
12/06/75	200.00	204.25	205.00	205.00
12/13/75	200.00	204.25	205.00	205.00
12/20/75	200.00	204.25	205.00	205.00
12/27/75	200.00	204.25	205.00	205.00

1976 Prices

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
1/03/76	$200.00	$204.25	$205.00	$205.00
1/10/76	200.00	204.25	205.00	205.00
1/17/76	200.00	204.25	205.00	205.00
1/24/76	200.00	204.25	205.00	205.00
1/31/76	200.00	204.25	205.00	205.00
2/07/76	210.00	214.25	215.00	215.00
2/14/76	210.00	214.25	215.00	215.00
2/21/76	210.00	214.25	215.00	215.00
2/28/76	210.00	214.25	215.00	215.00
3/06/76	210.00	214.25	215.00	215.00
3/13/76	200.00	204.25	205.00	205.00

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
3/20/76	200.00	204.25	205.00	205.00
3/27/76	200.00	204.25	205.00	205.00
4/03/76	200.00	204.25	205.00	205.00
4/10/76	200.00	204.25	205.00	205.00
4/17/76	200.00	204.25	205.00	205.00
4/24/76	200.00	204.25	205.00	205.00
5/01/76	210.00	214.25	215.00	215.00
5/08/76	210.00	214.25	215.00	215.00
5/15/76	210.00	214.25	215.00	215.00
5/22/76	210.00	214.25	215.00	215.00
5/29/76	210.00	214.25	215.00	215.00
6/05/76	210.00	214.25	215.00	215.00
6/12/76	210.00	214.25	215.00	215.00
6/19/76	210.00	214.25	215.00	215.00
6/26/76	210.00	214.25	215.00	215.00
7/03/76	210.00	214.25	215.00	215.00
7/10/76	210.00	214.25	215.00	215.00
7/17/76	210.00	214.25	215.00	215.00
7/24/76	210.00	214.25	215.00	215.00
7/31/76	210.00	214.25	215.00	215.00
8/07/76	210.00	214.25	215.00	215.00
8/14/76	210.00	214.25	215.00	215.00
8/21/76	210.00	214.25	215.00	215.00
8/28/76	210.00	214.25	215.00	215.00
9/04/76	210.00	214.25	215.00	215.00
9/11/76	210.00	214.25	215.00	215.00
9/18/76	210.00	214.25	215.00	215.00
9/25/76	210.00	214.25	215.00	215.00
10/02/76	210.00	214.25	215.00	215.00
10/09/76	210.00	214.25	215.00	215.00
10/16/76	200.00	204.25	205.00	205.00
10/23/76	200.00	204.25	205.00	205.00
10/30/76	200.00	204.25	205.00	205.00
11/06/76	200.00	204.25	205.00	205.00
11/13/76	200.00	204.25	205.00	205.00
11/20/76	200.00	204.25	205.00	205.00
11/27/76	200.00	204.25	205.00	205.00
12/04/76	200.00	204.25	205.00	205.00
12/11/76	200.00	204.25	205.00	205.00
12/18/76	200.00	204.25	205.00	205.00
12/25/76	200.00	204.25	205.00	205.00

1977 Prices

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
1/01/77	$200.00	$204.25	$205.00	$205.00
1/08/77	200.00	204.25	205.00	205.00
1/15/77	200.00	204.25	205.00	205.00
1/22/77	200.00	204.25	205.00	205.00
1/29/77	200.00	204.25	205.00	205.00

	Corrugating Medium		Linerboard	
Week	East	West	East	West
2/05/77	190.00	194.25	195.00	195.00
2/12/77	190.00	194.25	195.00	195.00
2/19/77	190.00	194.25	195.00	195.00
2/26/77	190.00	194.25	195.00	195.00
3/05/77	190.00	194.25	195.00	195.00
3/12/77	190.00	194.25	195.00	195.00
3/19/77	190.00	194.25	195.00	195.00
3/26/77	190.00	194.25	195.00	195.00
4/02/77	210.00	214.25	215.00	215.00
4/09/77	210.00	214.25	215.00	215.00
4/16/77	210.00	214.25	215.00	215.00
4/23/77	210.00	214.25	215.00	215.00
4/30/77	210.00	214.25	215.00	215.00
5/07/77	210.00	214.25	215.00	215.00
5/14/77	210.00	214.25	215.00	215.00
5/21/77	210.00	214.25	215.00	215.00
5/28/77	210.00	214.25	215.00	215.00
6/04/77	210.00	214.25	215.00	215.00
6/11/77	210.00	214.25	215.00	215.00
6/18/77	210.00	214.25	215.00	215.00
6/25/77	210.00	214.25	215.00	215.00
7/02/77	210.00	214.25	215.00	215.00
7/09/77	210.00	214.25	215.00	215.00
7/16/77	210.00	214.25	215.00	215.00
7/23/77	210.00	214.25	215.00	215.00
7/30/77	210.00	214.25	215.00	215.00
8/06/77	210.00	214.25	215.00	215.00
8/14/77	210.00	214.25	215.00	215.00
8/20/77	210.00	214.25	215.00	215.00
8/27/77	210.00	214.25	215.00	215.00
9/03/77	210.00	214.25	215.00	215.00
9/10/77	210.00	214.25	215.00	215.00
9/17/77	210.00	214.25	215.00	215.00
9/24/77	210.00	214.25	215.00	215.00
10/01/77	210.00	214.25	215.00	215.00
10/08/77	210.00	214.25	215.00	215.00
10/15/77	210.00	214.25	215.00	215.00
10/22/77	190.00	194.25	195.00	195.00
10/29/77	190.00	194.25	195.00	195.00
11/05/77	190.00	194.25	195.00	195.00
11/12/77	190.00	194.25	195.00	195.00
11/19/77	190.00	194.25	195.00	195.00
11/26/77	190.00	194.25	195.00	195.00
12/03/77	190.00	194.25	195.00	195.00
12/10/77	190.00	194.25	195.00	195.00
12/17/77	190.00	194.25	195.00	195.00
12/24/77	190.00	194.25	195.00	195.00
12/31/77	190.00	194.25	195.00	195.00

1978 Prices

Week	Corrugating Medium		Linerboard	
	East	West	East	West
1/07/78	$190.00	$194.25	$195.00	$195.00
1/14/78	190.00	194.25	195.00	195.00
1/21/78	190.00	194.25	195.00	195.00
1/28/78	190.00	194.25	195.00	195.00
2/04/78	190.00	194.25	195.00	195.00
2/11/78	190.00	194.25	195.00	195.00
2/18/78	190.00	194.25	195.00	195.00
2/25/78	190.00	194.25	195.00	195.00
3/04/78	190.00	194.25	195.00	195.00
3/11/78	190.00	194.25	195.00	195.00
3/18/78	190.00	194.25	195.00	195.00
3/25/78	190.00	194.25	195.00	195.00
4/01/78	190.00	194.25	195.00	195.00
4/08/78	200.00	204.25	205.00	205.00
4/15/78	200.00	204.25	205.00	205.00
4/22/78	200.00	204.25	205.00	205.00
4/29/78	200.00	204.25	205.00	205.00
5/06/78	200.00	204.25	205.00	205.00
5/13/78	200.00	204.25	205.00	205.00
5/20/78	200.00	204.25	205.00	205.00
5/27/78	200.00	204.25	205.00	205.00
6/03/78	200.00	204.25	205.00	205.00
6/10/78	200.00	204.25	205.00	205.00
6/17/78	200.00	204.25	205.00	205.00
6/24/78	200.00	204.25	205.00	205.00
7/01/78	200.00	204.25	205.00	205.00
7/08/78	200.00	204.25	205.00	205.00
7/15/78	200.00	204.25	205.00	205.00
7/22/78	200.00	204.25	205.00	205.00
7/29/78	200.00	204.25	205.00	205.00
8/05/78	200.00	204.25	205.00	205.00
8/12/78	200.00	204.25	205.00	205.00
8/19/78	200.00	204.25	205.00	205.00
8/26/78	200.00	204.25	205.00	205.00
9/02/78	200.00	204.25	205.00	205.00
9/09/78	210.00	214.25	220.00	220.00
9/16/78	210.00	214.25	220.00	220.00
9/23/78	210.00	214.25	220.00	220.00
9/30/78	210.00	214.25	220.00	220.00
10/07/78	210.00	214.25	220.00	220.00
10/14/78	210.00	214.25	220.00	220.00
10/21/78	210.00	214.25	220.00	220.00
10/28/78	210.00	214.25	220.00	220.00
11/04/78	210.00	214.25	220.00	220.00
11/11/78	210.00	214.25	220.00	220.00
11/18/78	210.00	214.25	220.00	220.00

	Corrugating Medium		Linerboard	
Week	East	West	East	West
11/25/78	210.00	214.25	220.00	220.00
12/02/78	210.00	214.25	220.00	220.00
12/09/78	210.00	214.25	220.00	220.00
12/16/78	210.00	214.25	220.00	220.00
12/23/78	210.00	214.25	220.00	220.00
12/30/78	210.00	214.25	220.00	220.00

1979 Prices

	Corrugating Medium		Linerboard	
Week	East	West	East	West
1/06/79	$210.00	$214.25	$220.00	$220.00
1/13/79	210.00	214.25	220.00	220.00
1/20/79	210.00	214.25	220.00	220.00
1/27/79	210.00	214.25	220.00	220.00
2/03/79	210.00	214.25	220.00	220.00
2/10/79	210.00	214.25	220.00	220.00
2/17/79	210.00	214.25	220.00	220.00
2/24/79	210.00	214.25	220.00	220.00
3/03/79	225.00	229.25	235.00	235.00
3/10/79	225.00	229.25	235.00	235.00
3/17/79	225.00	229.25	235.00	235.00
3/24/79	225.00	229.25	235.00	235.00
3/31/79	225.00	229.25	235.00	235.00
4/07/79	225.00	229.25	235.00	235.00
4/14/79	225.00	229.25	235.00	235.00
4/21/79	225.00	229.25	235.00	235.00
4/28/79	225.00	229.25	235.00	235.00
5/05/79	225.00	229.25	235.00	235.00
5/12/79	225.00	229.25	235.00	235.00
5/19/79	225.00	229.25	235.00	235.00
5/26/79	225.00	229.25	235.00	235.00
6/02/79	225.00	229.25	235.00	235.00
6/09/79	225.00	229.25	235.00	235.00
6/16/79	225.00	229.25	235.00	235.00
6/23/79	225.00	229.25	235.00	235.00
6/30/79	225.00	229.25	235.00	235.00
7/07/79	225.00	229.25	235.00	235.00
7/14/79	225.00	229.25	235.00	235.00
7/21/79	225.00	229.25	235.00	235.00
7/28/79	225.00	229.25	235.00	235.00
8/04/79	240.00	244.25	250.00	250.00
8/11/79	240.00	244.25	250.00	250.00
8/18/79	240.00	244.25	250.00	250.00
8/25/79	240.00	244.25	250.00	250.00
9/01/79	240.00	244.25	250.00	250.00
9/08/79	240.00	244.25	250.00	250.00
9/15/79	240.00	244.25	250.00	250.00
9/22/79	240.00	244.25	250.00	250.00
9/29/79	240.00	244.25	250.00	250.00
10/06/79	240.00	244.25	250.00	250.00

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
10/13/79	240.00	244.25	250.00	250.00
10/20/79	240.00	244.25	250.00	250.00
10/27/79	240.00	244.25	250.00	250.00
11/03/79	240.00	244.25	250.00	250.00
11/10/79	240.00	244.25	250.00	250.00
11/17/79	240.00	244.25	250.00	250.00
11/24/79	240.00	244.25	250.00	250.00
12/01/79	240.00	244.25	250.00	250.00
12/08/79	260.00	264.25	270.00	270.00
12/15/79	260.00	264.25	270.00	270.00
12/22/79	260.00	264.25	270.00	270.00
12/29/79	260.00	264.25	270.00	270.00

1980 Prices

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
1/06/80	$260.00	$264.25	$270.00	$270.00
1/12/80	260.00	264.25	270.00	270.00
1/19/80	260.00	264.25	270.00	270.00
1/26/80	260.00	264.25	270.00	270.00
2/02/80	260.00	264.25	270.00	270.00
2/09/80	260.00	264.25	270.00	270.00
2/16/80	260.00	264.25	270.00	270.00
2/23/80	260.00	264.25	270.00	270.00
3/01/80	260.00	264.25	270.00	270.00
3/08/80	260.00	264.25	270.00	270.00
3/15/80	260.00	264.25	270.00	270.00
3/22/80	260.00	264.25	270.00	270.00
3/29/80	260.00	264.25	270.00	270.00
4/05/80	260.00	264.25	270.00	270.00
4/12/80	260.00	294.25	270.00	300.00
4/19/80	260.00	294.25	270.00	300.00
4/26/80	260.00	294.25	270.00	300.00
5/03/80	290.00*	294.25	300.00	300.00
5/10/80	290.00*	294.25	300.00	300.00
5/17/80	290.00*	294.25	300.00	300.00
5/24/80	260.00	294.25	270.00	300.00
5/31/80	260.00	294.25	270.00	300.00
6/07/80	260.00	294.25	270.00	300.00
6/14/80	260.00	294.25	270.00	300.00
6/21/80	260.00	294.25	270.00	300.00
6/28/80	260.00	294.25	270.00	300.00
7/05/80	260.00	294.25	270.00	300.00
7/12/80	260.00	294.25	270.00	300.00
7/19/80	260.00	294.25	270.00	300.00
7/26/80	260.00	294.25	270.00	300.00

* Planned increases to $290.00 deferred. Official Board Markets, May 24, 1980, Vol. 56, No. 21, at 1.

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
8/02/80	260.00	294.25	270.00	300.00
8/09/80	260.00	294.25	270.00	300.00
8/16/80	260.00	294.25	270.00	300.00
8/23/80	260.00	294.25	270.00	300.00
8/30/80	260.00	294.25	270.00	300.00
9/06/80	260.00	294.25	270.00	300.00
9/13/80	260.00	294.25	270.00	300.00
9/20/80	260.00	294.25	270.00	300.00
9/27/80	260.00	294.25	270.00	300.00
10/04/80	260.00	294.25	270.00	300.00
10/11/80	260.00	294.25	270.00	300.00
10/18/80	260.00	294.25	270.00	300.00
10/25/80	260.00	294.25	270.00	300.00
11/01/80	260.00	294.25	270.00	300.00
11/08/80	260.00	294.25	270.00	300.00
11/15/80	260.00	294.25	270.00	300.00
11/22/80	260.00	294.25	270.00	300.00
11/29/80	260.00	294.25	270.00	300.00
12/06/80	260.00	294.25	270.00	300.00
12/13/80	260.00	294.25	270.00	300.00
12/20/80	260.00	294.25	270.00	300.00
12/27/80	260.00	294.25	270.00	300.00

1981 Prices

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
1/03/81	$260.00	$294.25	$270.00	$300.00
1/10/81	290.00	294.25	300.00	300.00
1/17/81	290.00	294.25	300.00	300.00
1/24/81	290.00	294.25	300.00	300.00
1/31/81	290.00	294.25	300.00	300.00
2/07/81	290.00	294.25	300.00	300.00
2/14/81	290.00	294.25	300.00	300.00
2/21/81	290.00	294.25	300.00	300.00
2/28/81	290.00	294.25	300.00	300.00
3/07/81	290.00	294.25	300.00	300.00
3/14/81	290.00	294.25	300.00	300.00
3/21/81	290.00	294.25	300.00	300.00
3/28/81	290.00	294.25	300.00	300.00
4/04/81	290.00	294.25	300.00	300.00
4/11/81	290.00	294.25	300.00	300.00
4/18/81	290.00	324.25	300.00	330.00
4/25/81	290.00	324.25	300.00	330.00
5/02/81	290.00	324.25	300.00	330.00
5/09/81	290.00	324.25	300.00	330.00
5/16/81	290.00	324.25	300.00	330.00
5/23/81	290.00	324.25	300.00	330.00
5/30/81	290.00	324.25	300.00	330.00

Week	Corrugating Medium East	Corrugating Medium West	Linerboard East	Linerboard West
6/06/81	290.00	324.25	300.00	330.00
6/13/81	290.00	324.25	300.00	330.00
6/20/81	290.00	324.25	300.00	330.00
6/27/81	290.00	324.25	300.00	330.00
7/04/81	290.00	324.25	300.00	330.00
7/11/81	290.00	324.25	300.00	330.00
7/18/81	290.00	324.25	300.00	330.00
7/25/81	290.00	324.25	300.00	330.00
8/01/81	290.00	324.25	300.00	330.00
8/08/81	290.00	324.25	300.00	330.00
8/15/81	290.00	324.25	300.00	330.00
8/22/81	290.00	324.25	300.00	330.00
8/29/81	290.00	324.25	300.00	330.00
9/05/81	290.00	324.25	300.00	330.00
9/12/81	290.00	324.25	300.00	330.00
9/19/81	290.00	324.25	300.00	330.00
9/26/81	290.00	324.25	300.00	330.00
10/03/81	290.00	324.25	300.00	330.00
10/10/81	290.00	324.25	300.00	330.00
10/17/81	290.00	324.25	300.00	330.00
10/24/81	290.00	324.25	300.00	330.00
10/31/81	290.00	324.25	300.00	330.00
11/07/81	290.00	324.25	300.00	330.00
11/14/81	290.00	324.25	300.00	330.00
11/21/81	290.00	324.25	300.00	330.00
11/28/81	290.00	324.25	300.00	330.00
12/05/81	290.00	324.25	300.00	330.00
12/12/81	290.00	324.25	300.00	330.00
12/19/81	290.00	324.25	300.00	330.00
12/26/81	290.00	324.25	300.00	330.00

APPENDIX II

West Coast Corrugating Medium Pre-Acquisition Capacity Based on 1982 Data

Company	1982 Capacity[1]	% of Total	HHI
Willamette	202,279	13.0%	169.00
Crown Zellerbach	157,725	11.3%	127.69
Menasha	152.911[2]	9.8%	96.04
Georgia Pacific	142,000	9.1%	82.81
Longview Fibre	133,125[3]	8.5%	72.25

[1] In general, capacity is computed for the west coast producers on the basis of 355 times the tons per day (TPD) capacity reported in WX 1303, plus any shipments made by these companies into the western states from their own eastern mills as reported on CX 953A. Shipments east by these producers were not excluded, since they represent capacity which is usable in the west.

In the case of eastern producers with western box shops, capacity is the west coast medium consumption for January through September 1982, annualized, taken from the WX 1200 series of exhibits.

In the case of other eastern shippers, the capacity figure is the same as their "Trans-Rockies Shipments" shown on CX 953.

[2] Menasha's capacity is based on Weyerhaeuser's current experience, at the North Bend mill, following incremental additions to capacity since the acquisition, as indicated in n. 22 to WX 1303.

[3] Longview Fibre's capacity is based on the testimony of Mr. Wollenberg at Tr. 621 and includes the "swing" capacity available at that mill.

	Initial Decision		106 F.T.C.
Weyerhaeuser	121,630	7.8%	60.84
Container Corp.	109,804	7.0%	49.00
Boise Cascade	97,625	6.3%	39.69
Louisiana Pacific	95,850	6.2%	38.44
Owens-Illinois	65,973	4.2%	17.64
[***]	[***]	[***]	[***]
International Paper	56,821	3.6%	12.96
Champion	36,317	2.3%	5.29
[***]	[***]	[***]	[***]
[***]	[***]	[***]	[***]
Packaging Corp.	20,961	1.3%	1.69
Other eastern mills[4]	31,838	2.0%	4.00
Totals	1,557,739	99.7	799.14

CR–2 24.3%
CR–4 43.2%
CR–8 72.8%

APPENDIX III

West Coast Corrugating Medium Post-Acquisition Capacity Based on 1982 Data

Company	1982 Capacity[1]	% of Total	HHI
Weyerhaeuser	274,280	17.6%	309.76
Willamette	202,279	13.0%	169.00
Crown Zellerbach	157,725	11.3%	127.69
Georgia Pacific	142,000	9.1%	82.81
Longview Fibre	133,125	8.5%	72.25
Container Corp.	109,804	7.0%	49.00
Boise Cascade	97,625	6.3%	39.69
Louisiana Pacific	95,850	6.2%	38.44
Owens-Illinois	65,973	4.2%	17.64
[***]	[***]	[***]	[***]
International Paper	56,821	3.6%	12.96
Champion	36,317	2.3%	5.29
[***]	[***]	[***]	[***]
[***]	[***]	[***]	[***]
Packaging Corp.	20,961	1.3%	1.69
Other eastern mills[2]	32,099	2.0%	4.00
Totals	1,557,739	99.7%	952.02

CR–2 30.6%
CR–4 51%
CR–8 79%

[4] "Other eastern mills" include Alton Boxboard Co., Consolidated Packaging, Continental Forest Industries, and Stone Container Corp.

[1] Capacity is computed in this table in the same manner as in Appendix II. In the case of Weyerhaeuser, the North Bend mill capacity has been added from Menasha's capacity in Appendix II.

[2] "Other eastern mills" include Menasha, as well as the others named in n. 4 to Appendix II.

OPINION OF THE COMMISSION

By Miller, *Chairman:*

This case presents the question of whether the acquisition by respondents Weyerhaeuser Company and Weyerhaeuser West Coast, Inc., of a corrugating medium mill in North Bend, Oregon from Menasha Corporation violates Section 7 of the Clayton Act[1] and Section 5 of the Federal Trade Commission Act.[2] Specifically, the complaint charges that the acquisition may substantially lessen competition in the production of corrugating medium in the eleven-state region west of the Rocky Mountains. Complaint counsel ask that respondents be required to divest the North Bend mill.[3]

Following evidentiary hearings Administrative Law Judge John J. Mathias concluded that complaint counsel had failed to establish the illegality of the acquisition, and ordered the [2] complaint dismissed. Complaint counsel appeal from this initial decision, claiming error in Judge Mathias' definition and analysis of the relevant market, and in his assessment of the likely effects of the acquisition on competition.

We agree that the ALJ improperly defined the relevant geographic market, and we also take exception to certain other portions of his analysis. Because of the antitrust record of the firms in the industry, this is a closer case than it otherwise would be. However, as a result of our consideration of the characteristics of the industry, we agree with the ALJ's ultimate conclusion that this acquisition does not threaten competition. We therefore dismiss the complaint. [3]

I. BACKGROUND

A. *The Acquisition and the Transacting Parties*

On December 24, 1980, respondent Weyerhaeuser Company ("Weyerhaeuser")[4] formalized an agreement with Menasha Corporation ("Menasha") for the purchase of certain Menasha assets, including its corrugating medium mill in North Bend, Oregon. (IDF 7.)[5] The

[1] 15 U.S.C. 18 (1982).

[2] 15 U.S.C. 45 (1982). The FTC Act is considered *in pari materia* with the Clayton Act. *See American Medical International, Inc.*, 3 Trade Reg. Rep. (CCH) ¶22,170 at 23,038 (104 F.T.C. 1, July 2, 1984). "This construction allows for using cases decided under any of the antitrust laws in dealing with cases brought by the Commission." *Atlantic Refining Co. v. FTC*, 344 F.2d 599, 606 (6th Cir.), *cert. denied*, 382 U.S. 939 (1965).

[3] Complaint Counsel's Appeal Brief, Appendix B ("Proposed Order").

[4] Weyerhaeuser Company and the two wholly-owned subsidiaries used in the challenged acquisition, Weybuy, Inc. and Weyerhaeuser West Coast, Inc., will be referred to here collectively as "Weyerhaeuser."

[5] The following abbreviations are used in this opinion:

ID – Initial Decision Page Number.
IDF – Initial Decision Finding Number.
Tr. – Transcript Page Number.
CX – Complaint Counsel's Exhibit, followed by its number and the referenced page(s).
RX – Respondents' Exhibit followed by its number and the referenced page(s).
CAB – Complaint Counsel's Appeal Brief Page Number.

(footnote cont'd)

acquisition of the North Bend mill is the [4] only aspect of the transaction challenged by the complaint. (IDF 8.)[6]

Corrugating medium is a paper product used almost exclusively in the fabrication of corrugated board, which, in turn, is used almost exclusively in the manufacture of corrugated containers (or, simply, "boxes"). (IDF 22.) In fabricating corrugated board, medium is used to form the fluted inner layer, and another paper product known as "linerboard" (or "liner") is used to form the flat outer facings. (IDF 24.) Together, medium and linerboard are generically referred to as "containerboard." (*Id.*)

Prior to and after the challenged acquisition, both Weyerhaeuser and Menasha were engaged in the production of containerboard. Weyerhaeuser is a large, integrated forest products company, which derived about $4.1 billion of its total 1981 sales of $4.5 billion from three forest products business segments: (1) building materials; (2) pulp, newspring, paper, and paperboard products; and (3) paperboard and packaging products, including containerboard. (IDF 1–2.) Prior to the challenged acquisition, Weyerhaeuser operated three medium mills (located in [5] Longview, Washington; Valliant, Oklahoma; and Plymouth, North Carolina (IDF 4)), and three linerboard mills (in Springfield, Oregon; Valliant, Oklahoma; and Plymouth, North Carolina (IDF 5)). Weyerhaeuser operates approximately thirty corrugated box plants. (CX 651, Stipulation 3.)

Menasha is also primarily a forest products company, conducting a major portion of its operations in the manufacture of medium and corrugated containers. (ID 6 n.3.) After the acquisition, Menasha continued to operate one medium mill in Otsego, Michigan (*id.*), and seven corrugated box plants in midwestern and eastern states. (CX 651, Stipulation 5.)

B. *The Complaint*

The complaint, issued on February 9, 1981, named Weyerhaeuser Company and Weybuy, Inc. as respondents. Weybuy, Inc. was eventually succeeded by Weyerhaeuser West Coast, Inc., which was sub-

RAB – Respondents' Answering Brief Page Number.
CCRB – Complaint Counsel's Reply Brief Page Number.
CF – Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order.
CB – Complaint Counsel's Brief in Support of Proposed Conclusions of Law.
RF – Respondents' Proposed Findings of Fact and Conclusions of Law.
RB – Respondents' Memorandum of Law In Support of Proposed Findings of Fact and Conclusions of Law.
CRB – Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law.
RRB – Respondents' Reply to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order.
IC – *In Camera.*

[6] In addition to the North Bend mill, Weyerhaeuser acquired from Menasha a 710-acre unimproved mill site in North Bend, three wastepaper collection facilities (two in Portland, Oregon and one in Eugene, Oregon), a box plant in Anaheim, California, an interest in Valley Crate Corporation, and $8.3 million of net working capital. (IDF 7.)

stituted as co-respondent on February 1, 1982. (*Id.*) Weyerhaeuser and Menasha were, at the time of the North Bend acquisition, and continue to be, engaged in "commerce," as that term is defined in Section 1 of the Clayton Act[7] and Section 4 of the FTC Act.[8] (CX 651, Stipulation 76.)

The complaint charged that Weyerhaeuser's acquisition of Menasha's North Bend Mill violated Section 7 of the Clayton Act and Section 5 of the FTC Act. It alleged that the production of corrugating medium constituted the relevant product market, and [6] that the eleven-state region west of the Rocky Mountains constituted the relevant geographic market for assessing the acquisition.[9]

The complaint alleged that the acquisition would "eliminate Menasha as a competitive entity . . . in the [w]est [c]oast market," thus "eliminat[ing] substantial actual competition. . . ."[10] It further alleged that the acquisition would greatly increase concentration in a market already "substantially concentrated." Using 1979 production figures, complaint counsel alleged that:

> Menasha and Weyerhaeuser ranked third and seventh, with 13.07 percent and 7.44 percent [market shares], respectively. The acquisition would make Weyerhaeuser the number one firm in the region, with 20.51 percent of [w]est [c]oast corrugating medium production.[11]

Four-firm concentration, as computed by complaint counsel, would increase from 53.27 percent to 60.71 percent; and eight-firm [7] concentration would rise from 85.39 percent to 91.32 percent.[12] The complaint also argued that high entry barriers are present in this market,[13] a condition which, if it exists, would dampen the competitive response to price increases by market incumbents.

The complaint requested that the Commission prohibit Weyerhaeuser from consummating "the proposed acquisition of Menasha;" prohibit it for a period of ten years from acquiring another company in the medium market without obtaining prior FTC approval; require

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[7] 15 U.S.C. 12 (1982).

[8] 15 U.S.C. 44 (1982).

[9] Complaint counsel define "west coast market" as including the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[10] Complaint ¶ 14.

[11] *Id.* ¶ 11. The market share statistics we derive differ slightly from those contained in the complaint as a result of the use of more recent (1981) data, and the inclusion of shipments into the west coast from outside the region. Further, we note that the complaint does not discuss the Herfindahl-Hirschman Index ("HHI") measurement of concentration in this market. We provide these numbers later in the opinion because of our belief that HHI figures are generally preferable to simple concentration ratios for analyzing market structure. *Grand Union Co.*, 102 F.T.C. 812, 1053–54 & n.47 (1983). *See* U.S. Department of Justice Merger Guidelines at § 3.1 (June 14, 1984), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶4490, at 6879–13 ("1984 Guidelines") and Statement of the Federal Trade Commission Concerning Horizontal Mergers at 2–3 (June 14, 1982), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶4515 at 6901–2 ("FTC Statement").

[12] Complaint ¶ 14.

[13] *Id.* ¶ 12.

it to file compliance reports with the FTC; and grant any additional relief appropriate to the case.[14]

C. *Procedural History*

Before the complaint was filed, the Commission sought to enjoin the pending acquisition, pursuant to Section 13(b) of the FTC Act.[15] After conducting an evidentiary hearing on the FTC's motion for a preliminary injunction, the United States District Court for the District of Columbia denied the motion and allowed the acquisition to go forward, subject to the terms of a hold-separate order.[16]

Following some procedural skirmishes, the U.S. Court of Appeals for the D.C. Circuit upheld the District Court's order, [8] including the hold-separate requirement.[17] Subsequently, the District Court entered a second order, implementing more fully the hold-separate arrangement, which remains in effect. (ID 2–3.) Accordingly, complaint counsel seek an order undoing, rather than preventing, Weyerhaeuser's acquisition of the North Bend mill. (CAB 1; CB 231–39.)

D. *The Initial Decision*

The ALJ's Initial Decision was issued on October 11, 1983. He concluded that complaint counsel had failed to prove that the North Bend acquisition may substantially lessen competition or tend to create a monopoly, and ordered the complaint dismissed. (ID 5.)

Judge Mathias readily concluded that corrugating medium constitutes the relevant product market. (ID 86–87.) The question of what constitutes the relevant geographic market proved considerably more difficult. After reviewing the evidence concerning the production, marketing, and consumption of containerboard, Judge Mathias concluded that a national market exists for corrugating medium. (ID 87–91.) Considering Weyerhaeuser's post-acquisition share of "total national capacity," he found that "the concentration level [created by the North Bend acquisition] is obviously of no concern,"[18] judged [9] against the standards set out in the 1982 Department of Justice Merger Guidelines.[19] (IDF 183.)

Judge Mathias also held, alternatively, that "the concentration figures in this case would not support the finding of a violation even

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[14] *Id.*, "Notice of Contemplated Relief."

[15] 15 U.S.C. 53(b) (1982).

[16] *FTC v. Weyerhaeuser Co.*, 1981–1 Trade Cas. (CCH) ¶ 63,974 (D.D.C. 1981).

[17] *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981).

[18] The record indicates that the merger increased four-firm concentration in a national "market" from 31 percent to 34 percent. The national HHI increased 36 points, from 454 to 490. RX 1354, 1355; RF p. 201, Table IV–2.

[19] *Reprinted in* 2 Trade Reg. Rep. (CCH) ¶4500. This version of the Guidelines has been superceded by the 1984 Guidelines, *supra* note 11, since the release of the Initial Decision. However, both versions use the same HHI scale. *Compare* Section III.A of the 1982 Guidelines with Section 3.1 of the 1984 Guidelines. The Guidelines state that the Justice Department will not challenge mergers resulting in a post-merger HHI below 1000, "except in extraordinary circumstances."

if it were determined that a west coast market existed." (ID 94.) He calculated market shares in this hypothetical market on the basis of west coast plant capacity *plus* the capacity of "eastern" medium producers with corrugated box plants in the west coast region ("to the extent necessary for the supply of those box shops in the event of a collusive curtailment of supply on the west coast"). (ID 93.) Using this definition, he found that the post-acquisition Herfindahl-Hirschman Index ("HHI")[20] in the west coast market would be 952.02, "showing an increase . . . of about 150 points." (ID 94.) Judge Mathias determined that this change in concentration "falls below the critical level of the Justice Department *Guidelines*," (*id.*)—that is, a post-merger HHI of 1000. He further reasoned that the HHI figure for a west coast market probably understated the competitive rigor of the market, for three reasons: [10]

(1) entry barriers are very low, especially for eastern mills and through the expansion of production by western mills . . . ; (2) there has been no appreciable trend toward concentration in that "market" up to the time of this acquisition; and (3) the "market" has shown a great deal of volatility in market shares in the recent past. (ID 92, citing IDF 195–226.)

Judge Mathias thus concluded that the North Bend acquisition had not been shown to threaten competition in medium production, either in a national or a west coast market.

II. ANALYSIS

A. *Overview*

We adopt Judge Mathias' definition of corrugating medium as the relevant product market, but reject his finding of a national geographic market. Instead, we find the west coast market posited by complaint counsel to be the relevant geographic market. We then consider the likely effects of the acquisition in the west coast market by examining, as required by merger case law, both "qualitative factors—the market's 'structure, history, and probable future'—and quantitative factors."[21] As a result of this inquiry, we conclude that the market would not be likely to suffer a substantial lessening of competition as a result of the challenged acquisition. We therefore dismiss the complaint. [11]

[20] "The HHI is calculated by summing the squares of the individual market shares of all the firms included in the market. . . ." 1984 Guidelines, *supra* note 11, at 6879–13.

[21] *American Medical International*, *supra* note 2, at 23,043 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962)).

B. *The Corrugating Medium Market*

There are two basic types of corrugating medium: semichemical and recycled. (IDF 32.) These two types differ primarily in the types of raw materials required for their manufacture. Semichemical medium is produced using wood fiber, typically hardwood. In some cases, recycled fiber is mixed with wood fiber in making semichemical medium. (IDF 32–33.) Recycled medium is made entirely from recycled materials, including old corrugated containers and wastage from box plant operations. (IDF 32, 37–38.) The operation of semichemical and recycled mills differs principally in the processes used to convert their respective raw materials into pulp. (IDF 40–41.) Beyond the pulping stage, the mills use essentially identical manufacturing processes. (IDF 44–45.) Semichemical mills tend to be larger than recycled mills. The minimum efficient size for a semichemical mill is estimated to be roughly 600 tons per day; a recycled mill's minimum efficient size is roughly 300–500 tons per day. (IDF 46–47.)

There are 33 semichemical and 21 recycled mills in the United States, for a total of 54 medium facilities. (IDF 48.) This number includes four "swing mills" (RX 1354–55 IC), capable of producing either linerboard or medium. (IDF 81.) These medium facilities are operated by some 35 different companies. (RF p. 201, Table IV–2.)

In the 11 states of complaint counsel's west coast market, 13 medium mills—seven semichemical and six recycled—were operated by 12 companies, before the challenged [12] acquisition. (IDF 48.) This number includes two swing mills.[22] (IDF 82.)

Domestic production and capacity in the containerboard industry have grown significantly in recent years. (IDF 150.) Medium production increased by almost 34 percent, from 4,264,000 tons to 5,702,100 tons, between 1970 and 1981. (RX 1338–N.)

Virtually all medium is used to produce corrugated containers. (CX 651, Stip. 43.) Box plants have diverse containerboard needs, and thus vary their orders of medium as to weight, width, grade, and other specifications. (IDF 54.) As a result, medium is typically manufactured to fill specific customer orders. (IDF 61.) Because it is perishable, medium is difficult to store for long periods of time, and is thus not generally produced for or sold out of inventory. (IDF 61, 63–65.)

Many producers of medium and linerboard also manufacture boxes. (IDF 86.) In 1979, at least 30 of the 41 domestic producers of medium also produced corrugated boxes. (IDF 87.) In the west coast region, 10 of the 11 companies producing medium also operated box plants in the

[22] Swing mills are operated by Crown Zellerbach, in Antioch, California, and by Longview Fibre, in Longview, Washington. Willamette's Port Hueneme, California, operation may also have the capacity to "swing" to liner production. Because the record is not clear on this point, and because the facility had always produced medium at the time of the hearing below (CF 2–42), we will treat the mill as a medium facility.

region. (IDF 87, 124, 126–27.) At the time of the North Bend acquisition, Weyerhaueser operated approximately 30 corrugated container plants (including eight in [13] the west coast region), and Menasha operated eight such plants (one in the west). (CX 651, Stipulations 3, 5.)

Given this level of integration of medium and box production, it comes as no surprise that "most of the corrugating medium produced is consumed internally or indirectly through exchanges, by [box] plants owned by containerboard producers." (IDF 88.) Weyerhaeuser, for example, internally consumes about 70 percent of its containerboard production in its own box shops. (*Id.*)

Indirect consumption, through so-called "exchange agreements," is an important aspect of the functioning of this industry. Such agreements are generally negotiated on an annual basis. The parties in effect, coordinate two buy-and-sell obligations, typically by means of a ton-for-ton exchange of product. In an exchange, or "trade," "one producer ships medium or linerboard to a second producer's box plant in exchange for shipments of medium or linerboard to one of the first producer's box plants." (IDF 90.) Exchanges are similar to open market sales in the way payments are made. Typically, each delivery is separately invoiced and paid for: "money changes hands as it would in a direct sale or purchase." (IDF 101.) In order to avoid direct price communications between competitors, exchange agreements typically are executed using the prices reported in [14] *Official Board Markets* ("OBM"), an independent publication that reports containerboard prices. (IDF 102.)[23]

Although the vast majority of medium is consumed directly or indirectly (through exchanges) by the manufacturers, some medium is sold on the open market. "Independent" box plants (those without captive medium capacity), as well as some integrated producers, purchase medium in open market transactions. (IDF 109–10.) There are also independent brokers who "make a market" in medium. (IDF 112–17.)

It is clear that the open market represents the smallest portion of the medium market. Thus, on the west coast:

> only about 12% of the medium consumed was sold on the open market, with about 24% being utilized by the box plants of eastern producers (primarily through trades) and about 64% being consumed in the box plants of the west coast medium producers. (IDF 111.)

[23] OBM prices are characterized as those " 'announced to customers by major board producers.' " (IDF 102, citing RX 1508 A–4.) OBM apparently generates price information through contacts with independent box producers. (Tr. 1516 (testimony of Dr. David Kamerschen).)

Because the OBM price does not always reflect the prevailing market price, *see* pp. 16–17, *infra*, a box plant purchasing medium through an exchange frequently receives an intra-company adjustment or rebate to bring its cost into line with its company's then-prevailing internal transfer price. (IDF 104.)

C. *Recent History of the Industry*

Complaint counsel's major arguments with respect to both geographic market definition and likelihood of anticompetitive effects hinge on their interpretation of cost and price movements in the industry during the period 1973–1983. A preliminary [**15**] sketch of this history will facilitate our consideration of complaint counsel's legal arguments.

We will use the medium price lists published in OBM as a first approximation of the price levels in the industry. OBM publishes prices for sales of various paperboard products in five regions: New England, Middle Atlantic, South and South Central, North Central, and West Coast. (CX 634–A.) Because medium prices in all the regions except the West Coast historically have been identical at any given time, changes in OBM medium prices will be discussed in terms of prices (1) in the west, and (2) in the other four regions (the "east"), during the period in question.

From January 6, 1973, to April 12, 1980, OBM showed the prices of eastern and western medium changing simultaneously, consistently reflecting a $4.25 differential between eastern medium and the higher-priced western medium. (ID, Appendix I.) The $4.25 differential was the result of higher raw material and transportation costs facing western mills. (CRB p. 23 n.2; CX 30.)

On April 12, 1980, OBM reported a dramatic increase in the east-west price differential: OBM's western medium price rose $30, to $294.25, while the eastern price remained unchanged at $260. The western price increase was triggered by increases in the cost of wood chips on the west coast, resulting from an increase in chip exports from the region during 1979–80. (IDF 121.) Later in 1980, a recession struck the construction industry. (CAB 33 n.1.) As a result, the supply of residual [**16**] chips, which are a derivative product of lumber milling operations, decreased. Chip prices again increased; because western mills tend to utilize residual chips and eastern mills tend to utilize more pulpwood (*i.e.*, trees cut and chipped expressly for paper manufacturing), this price increase had a differentially stronger effect on western costs and prices. (CCRB 8 n.3; CRB p. 22 n.3.)

During this period, OBM reported the following price changes:

OBM Medium Prices (Per Ton)

Week	East	West
4/12/80	$260	$294.25
5/3/80	290	294.25
5/24/80	260	294.25
1/10/81	290	294.25
4/18/81	290	324.25
12/26/81	290	324.25

(ID, Appendix I.)

The record indicates that the $34.25 east-west differential was reported in OBM throughout 1982. (CX 953–A; ID 33 n.11.)

It would be incorrect, however, to assume that OBM prices provide a complete picture of actual transaction prices during all of 1981–82. In the first place, OBM "expressly disclaims that its reported price portrays the range of transaction prices [17] at any given time." (IDF 246.)[24] Most importantly, OBM prices do not reflect discounts offered in individual transactions. (ID 73 n.25; IDF 248.) Thus, in periods of weak demand, when sellers are most likely to offer below-list prices, OBM prices do not accurately reflect actual prices of open market transactions. (IDF 249.)

In fact, demand for medium began to drop all across the country during the fourth quarter of 1981, and continued to fall during 1982. (IDF 239–40.) The record contains evidence of numerous sales made below list price, beginning in the fall of 1981. Discounts from OBM prices became larger and more common as 1982 wore on, as evidenced by the reductions in firms' transactions prices. (IDF 241–42, 248.) Weyerhaeuser, for example, cut its west coast transactions price for medium from $324.25 to $295 in April 1982, and further reduced it to $270 in August of that year. (RX 1333–K,L IC.) In the east, Weyerhaeuser's medium transactions price fell from $290 to $260, and then to $240, over roughly the same period. (*Id.*) Weyerhaeuser's pricing pattern appears to have been typical of the industry, with the result, noted by the ALJ, that the east-[18]west price differential "was approximately the same ($30–35) on a transaction basis as on the basis of OBM prices during this time." (ID 33 n.10.)

By March, 1983, OBM was reporting an east-west differential in the $10–14 range, with eastern medium listed at $260 and western at $274. (ID 33 n.11; CRB p. 21 n. 1; Tr. 2509 (testimony of Michael Brown).)

D. *Relevant Markets*

Fixing the "line of commerce" and "section of the country" in which a merger is to be analyzed under Section 7 of the Clayton Act involves defining the product and geographic markets relevant to antitrust concerns.[25] As the Commission recently noted, scrutiny of challenged

[24] OBM states that:

> The prices tabulated here are intended only as a reference standard to the current levels commonly prevailing in a representative proportion of U.S. contract transactions, as announced to customers by major board producers. The prices listed do not connote any agreement or commitment by any producer to sell material at the price indicated, or at any price predicated on the price listed. Transactions may be concluded at any time at any price agreed upon by seller and purchaser. (RX 1508 A–4).

[25] *American Medical International, supra* note 2, at 23,038–39.

horizontal mergers "has focused on the extent to which the mergers confer market power on the acquiring firm or enhance the ability of firms to collude, either expressly or tacitly."[26] Obviously, then, the specification of [19] the product and geographic markets in which market power could be exercised successfully is crucial to evaluating the competitive effect of a proposed horizontal acquisition.

For antitrust purposes, market definition properly involves an assessment of the responsiveness of buyers and sellers in the hypothetical market to price changes. In economists' parlance, measures of supply and demand elasticity and cross-elasticity would, ideally, provide the information necessary to accurately define these markets.[27] However, "[i]n most instances, adjudicators and policymakers do not have very precise estimates of [these] figures."[28] The typical case, in this world of less than perfect information, involves a search for reasonable bases from which to infer the price-responsiveness of supply and demand in the proposed product and geographic markets.

1. Product Market

Under Supreme Court doctrine, "a relevant product market for Section 7 analysis may be defined in terms of the 'cross-elasticity of demand' or the 'reasonable interchangeability of use' between the product in question and proposed potential substitutes."[29] In this case, the record demonstrates that there are no close substitutes for corrugating medium. (IDF 156.) Most importantly, linerboard, though a complementary good, cannot [20] be substituted for medium, since the two have different structural characteristics and are used to provide different strengths to corrugated board: the former provides "burst strength and tear strength" while the latter provides "stiffness, rigidity, crush strength, and compression strength." (IDF 28, 26.) There is no evidence of any other products which could be substituted economically for medium. (IDF 156.)

In addition to demand-side interchangeability, the Commission inquires into supply-side flexibility.[30] In this case, there appear to be no non-medium facilities, aside from the few "swing mills" which can produce either medium or linerboard, that could be economically converted to medium production. (IDF 159–65.) Thus, we conclude, as did Judge Mathias, that "supply-side flexibility is minimal" and "insufficient to include any other paper product within the same relevant product market as corrugating medium." (IDF 165.)

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[26] FTC Statement, *supra* note 11, at 6901–2.

[27] *Grand Union*, *supra* note 11, 102 F.T.C. at 1039–41.

[28] *Id.* at 1040.

[29] *Id.* at 1041–42.

[30] FTC Statement, *supra* note 11, at 6901–6 ("a high cross-elasticity of supply tends to suggest the existence of a common product market"). *See Budd Co.*, 86 F.T.C. 518, 570–72 (1975) (high degree of supply cross-elasticity).

Further indications supporting a medium-only product market include: separate and distinct prices for medium and liner; evidence of industry recognition of a separate market for liner and of planning by medium producers based solely on their estimation of the market plans of other medium makers; and the absence of evidence of medium customers (or producers) substituting another product for medium as a result of price differentials. (IDF 166.) [21]

In short, the evidence available to us points consistently to a product market composed only of corrugating medium. We will include in this product market the captive production and consumption of medium, as well as the medium produced for use in exchange agreements and for sale in the open market. This is consonant with our recent discussion of the problem posed by captive production:

> Captive production should ordinarily be treated as part of the relevant product market in merger cases when, as the Justice Department has suggested, a "small but significant and nontransitory" price increase is likely to induce vertically integrated firms to increase production of the relevant product, either for outside sales or to increase their own downstream sales.[31]

Here, the market share calculations offered by complaint counsel and by Weyerhaeuser included captive production (or sales). The propriety of this approach was thus not disputed below. Moreover, we find no record evidence which supports the exclusion of captive production. Therefore, we will treat it as part of the relevant product market.

2. Geographic Market

As noted, Weyerhaeuser asserts the existence of a nationwide market for medium, while complaint counsel urge the adoption of a geographic market definition limited to the eleven states west of [22] the Rocky Mountains. The arguments offered by both sides will be evaluated within the framework for defining geographic markets set forth in our *Grand Union* decision, which stated that the Commission would consider:

> the extent of different price changes and patterns from region to region; the level of barriers to trade flow between regions (including high transportation costs relative to product value); the degree of product shipping from one region to another (*i.e.*, transshipment); and the perceptions of competition from distant firms on the part of industry members.[32]

Weyerhaeuser argues that the similarities in price movements be-

[31] *B.A.T. Industries, Ltd.*, 3 Trade Reg. Rep. (CCH) ¶22,218 at 23,205 (104 F.T.C. 852, December 17, 1984) (citing 1984 Guidelines, *supra* note 11, at 6879–10). *See also International Telephone & Telegraph Corp.*, 3 Trade Reg. Rep. (CCH) ¶22,188 at 23,086–87 (104 F.T.C. 280, July 25, 1984).

[32] *Grand Union*, *supra* note 11, 102 F.T.C. at 1041.

tween the eastern and western markets during 1973–83 "are strong evidence of a single market" (RAB 20), citing Areeda and Turner for the proposition that "[w]hen prices and price movements in two territories are closely correlated, a single market definition is strongly indicated."[33] This is the same general view adopted by Judge Mathias.[34]

Complaint counsel view medium's pricing patterns in 1980–82, as reported by OBM, as evidence from a "natural experiment" as to geographic markets: because the $34.25 price differential between east and west did not attract sufficient entry (particularly in the form of increased sales by eastern mills) to narrow the differential, no single national market exists. [23]

> If there were a national market, it would not have been possible for West Coast prices to increase by $30 (an increase from about 2% higher than eastern prices to about 11% higher) in April 1980 and to remain at this higher level for a period of nearly three years. . . . In a national market, a price increase of this magnitude on the West Coast would rapidly draw shipments from other regions, thereby causing prices to decline on the West Coast or to rise in the other regions, and restoring the price differential to its equilibrium level. Since this clearly did not happen, simply looking at the pricing history in the industry should be almost enough to convince one that the West Coast is a separate market. (CAB 22 (footnotes omitted).)

Complaint counsel bolster their argument by reference to consumption and shipment figures for the west coast region:

> [O]ver a period of almost six years, spanning a wide variety of market conditions, more than 90% of the medium consumed on the West Coast was produced in that region, and more than 90% of the medium produced on the West Coast was consumed there. (CAB 10, citing CX 953.)

Supporting complaint counsel's argument is the ALJ's finding that the transportation costs involved in east-to-west shipments were not covered by the east-west price differential at any time described in the record, "even during the period when [the OMB east-west price differential] was at $34.25." (IDF 123.) Further, Judge Mathias concluded that the east-west price differential was unlikely to cover the transportation cost differential "in the near future . . . barring a renewal of the deep recession in the housing industry which occurred in 1981 and 1982." (ID 33 n.11.)

In response to complaint counsel's claim of a "natural experiment," Weyerhaeuser raises record evidence of an [24] increase in the percentage of medium consumed in the west provided by eastern mills

[33] *Antitrust Law* ¶ 522 at 355 (1978). *Accord*, 1984 Guidelines, *supra* note 11, at 6879–11; FTC Statement, *supra* note 11, at 6901–7.

[34] ID 90–91 (eastern and western prices move in " 'lock-step fashion' ").

after the $34.25 differential showed up in the OBM price lists in April, 1980:

Year	Percent
1977	5.9
1978	8.8
1979	6.9
1980	5.5
1981	7.6
1982	9.6

(IDF 137.) Thus, Weyerhaeuser points to an increase from 5.5 percent of western consumption in 1980 (the year the large differential appeared) to 7.6 percent in 1981 and 9.6 percent in 1982. Moreover, Weyerhaeuser notes that a large number of eastern medium producers have served their own, or other customers', western needs. During the period 1977–82, 16 different companies shipped medium to the west coast from 21 different eastern mills. (IDF 135; CX 953A.)[35]

Complaint counsel treat this evidence as completely beside the point:

> [W]hatever increases [in east-west shipments] did occur clearly were insufficient to cause any movement in the relative [east-west] price differential. . . . Thus, the natural experiment remains a most compelling demonstration of a separate [w]est [c]oast market. (CAB 21.) [25]

As a logical matter, any increase in the east-west price differential brings the medium market somewhat closer to a substantial supply response from eastern mills. The key in defining a geographic market, however, is not whether any shipments are made into a given area, but rather whether the shipments from outside are or could be substantial enough to significantly influence prices and price movements in the area.[36] On this record, it does not appear that the increase in east-to-west shipments during the existence of a $34.25 price differential ever had a significant effect on the size of the differential. Instead, a shift in the relationship of eastern to western fiber costs appears to have been the cause of the narrowing of the differential to the $10–$14 range in the spring of 1983. (CR 1–24, 1–25.)

Given the high level of within-region consumption of west coast medium and the low level of "exports" of west coast medium, the ALJ's finding that it is unlikely (barring another severe housing

[35] Of these 21 mills, eight were owned by companies with box plants in the west coast region; seven were owned by companies with west coast medium mills and box shops; and six of the mills had no proprietary relationship with a west coast box plant. (IDF 133.) As a percentage of western consumption, medium shipped in from the east by integrated firms operating only box shops in the west went from 3.4 percent in 1979 to 2.6 percent in 1980, 4.0 percent in 1981, and 4.2 percent in 1982. (CAB 14.)

[36] *Dairymen, Inc.*, 102 F.T.C. 1151, 1163 n.4 (1983) (Douglas, Comm'r, concurring).

recession), that the east-west price differential will exceed the relevant transportation costs, and the fact that a price differential of roughly 11 percent did not induce significant eastern entry into the west coast market, we conclude that the geographic market hypothesized by complaint counsel is the correct market for the purposes of our analysis. [**26**]

E. *Effect of the Acquisition on Competition*

The ultimate question in a Section 7 case is whether the effect of the challenged acquisition "may be substantially to lessen competition, or to tend to create a monopoly" in the relevant market.[37] Section 7 does not, by its own terms, "prescribe any particular methodology" for answering this question.[38] In practice, the Supreme Court has developed a two-step test for evaluating horizontal mergers.

In the first step, market share statistics are treated as a proxy for the danger that the challenged merger will create market power. The initial question, then, is whether the merger

> produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, [such that] it is . . . inherently likely to lessen competition substantially. . . .[39]

A finding of *prima facie* illegality on the basis of concentration statistics can be rebutted by a showing that "the merger is not likely to have such anticompetitive effects."[40] This second step of the analysis requires that the merger be "functionally viewed, in the context of its particular industry."[41] Thus, while market share evidence is "an important [**27**] starting point in merger analysis, it alone is not conclusive in determining the legality of a merger under Section 7."[42] Put another way, "a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect."[43] "[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."[44]

Our review of the facts of this case lead us to conclude that complaint counsel have failed to show that it is reasonably probable that the North Bend acquisition would substantially lessen competition.[45]

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[37] 15 U.S.C. 18 (1982).

[38] *American Medical International, supra* note 2, at 23,043.

[39] *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

[40] *Id.*

[41] *Brown Shoe, supra* note 21, 370 U.S. at 321–22.

[42] *American Medical International, supra* note 2, at 23,043. *See also Beatrice Foods Co.*, 101 F.T.C. 733, 819 (1983).

[43] *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984).

[44] *Brown Shoe, supra* note 21, 370 U.S. at 322 n.38.

[45] *Id.* at 323 n.39 (Congress intended that Section 7 be applied only in cases evidencing "the reasonable probability," rather than the "mere possibility," of anticompetitive effects).

1. Market Concentration

The premerger market concentration figures, based on 1981 data for the mills located in the eleven states of the west coast region, are as follows:[46] [28]

Firm	Percent
Crown Zellerbach	13.26
Willamette	12.11
Georgia-Pacific	11.76
Menasha	11.26
Weyerhaeuser	9.38
Container Corp.	9.16
Longview Fibre	8.84
Boise Cascade	7.81
Louisiana-Pacific	4.92
Inland Container	4.77
Newark Boxboard	1.73
Specialty Paper	1.68
East-to-west shipments by eastern-only producers [29]	3.30

As a result of the challenged acquisition, Weyerhaeuser became the largest firm in the market, with 20.64 percent of west coast production. The four-firm concentration ratio increased from 48.4 percent to 57.8 percent.

As always, our consideration of these statistics is guided by the Supreme Court's decision in *United States v. General Dynamics Corp.*, the last non-bank horizontal merger case decided by the Court. In that case, the Government presented an array of market share percentages and simple concentration ratios that were roughly comparable

[46] With the exception of the figures for Crown Zellerbach and Longview Fibre, these statistics are based on 1981 production, rather than capacity, information. The choice of production data over capacity data was governed by two flaws in the available capacity information: firm-to-firm variations in the definition and measurement of capacity (CPF 4–8) and rising marginal costs at less-than-capacity rates of production. (CX 924–X.) "East-to-west shipments" of firms with both western and eastern medium mills are included in those firms' market share figures. Such shipments by firms with only eastern medium facilities appear in a summary line at the bottom of the chart, but were attributed to each individual eastern firm in computing the HHI statistics.

The figures for Crown Zellerbach and Longview Fibre were computed to reflect 100 percent of the capacity of the swing mills operated by the two firms, thereby capturing the firms' ability to react to changes in the medium market by "swinging" more of their productive capacity into medium. (IDF 220–25.) During 1981, Crown produced medium at the rate of about 11 percent of its total capacity, and Longview devoted about 64 percent of its total capacity to medium production. The remainder of these firms' swing mill resources were devoted to liner production. Given that both companies do produce medium at these facilities, and that Longview devotes the majority of its mill resources to medium production, it is reasonable to suppose that both firms would react to an increase in the price of medium by expanding their medium output, to some degree. We cannot predict, with any precision, the response which would be forthcoming at any particular combination of medium and liner price levels. The inclusion of 100 percent of these two firms' swing mill capacities captures the maximum effect their presence may have on potential colluding firms in the industry. We should note, however, that our counting only actual production by Crown and Longview would not alter the market concentration statistics to a decisionally significant degree, given the non-statistical facts of this case. Source: CPR p. 27; CX 953.

to the west coast figures in this case.[47] The Supreme Court concluded that the Government's showing would "have sufficed to support a finding of 'undue concentration' in the absence of other considerations."[48] Under the *General Dynamics* benchmark, the concentration figures in the matter before us suggest a *prima facie* violation.

We note also that the acquisition increased the HHI by 211 points, from 955 to 1166. The acquisition thus falls within the lower end of the mid-range of the Department of Justice Merger Guidelines, and calls for especially careful review of a number [30] of industry characteristics in addition to concentration in order meaningfully to assess the acquisition's effect on competition.[49]

We thus proceed to the second, qualitative step of horizontal merger analysis: the determination whether the North Bend acquisition "is not likely to have . . . anticompetitive effects."[50]

2. Industry Performance

In arguing that the acquisition will have anticompetitive effects, complaint counsel seek to portray the west coast medium industry as one prone to (at least) tacit collusion, whose performance will deteriorate even further if the acquisition is allowed to stand. Complaint counsel allege that "West Coast medium producers in fact have been able to act in their mutual and collective interest to achieve results consistent with what would be expected in the event of actual collusion." (CAB 30.)

In attempting to show that West Coast medium producers have the "ability to control the price and supply of medium in the [31] [w]est [c]oast market" (CAB 30), complaint counsel rely principally on two instances in which Weyerhaeuser and other producers took "downtime"—that is, cut production—during periods of falling demand, and on Weyerhaeuser's past antitrust compliance problems.

The "downtime" charges concern portions of the years 1974–75 and 1981–82, during which the demand for medium dropped markedly.[51] (IDF 229, 239.) Complaint counsel claim that these episodes demon-

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[47] In *General Dynamics*, the government provided market share statistics for two alternative market definitions. In one market, the premerger four-firm concentration ratio was 43 percent, and the challenged merger increased the share of the acquiring firm from 7.6 percent to 12.4 percent. In the other market, the premerger four-firm figure was 54.5 percent, and the acquiring firm went from a 15.1 percent to a 23.2 percent share. 415 U.S. 486, 494–96 (1974).

[48] *Id.* at 497–98.

[49] 1984 Guidelines, *supra* note 11, at 6879–14. While the Guidelines provide useful benchmarks, it is clear that "cases falling just above and just below a threshold present comparable competitive concerns." *Id.* at 6879–13.

[50] *Philadelphia National Bank*, *supra* note 39, 374 U.S. at 363. The finding of a *prima facie* violation of Section 7 shifts the burden of going forward with the evidence to the respondent/defendant. *Kaiser Aluminum & Chemical Corp. v. FTC*, 632 F.2d 1324, 1340 & n.12 (7th Cir. 1981). The government continues to bear the burden of persuasion. *Id. See also* 9 Wigmore, Evidence Section 2489 (Chadbourn rev. 1981) (the burden of persuasion "never shifts"); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (burden of persuasion in Title VII litigation "remains at all times with the plaintiff").

[51] Complaint counsel also argue that an episode of tacit coordination occurred in 1980, when an alleged decrease in costs was not reflected in a lowering of medium prices. (CAB 32–33.) This argument suffers from ambiguity in

(footnote cont'd)

strate west coast producers' "impressive ability to cut back production and to maintain stable price levels during periods of declining costs and demand." (CAB 37.) However, complaint counsel's characterization of the performance of western producers during 1974–75 as evidencing tacit collusion is seriously undercut by the similarities between developments in the western and eastern markets. The decline in demand, which [32] began in the fourth quarter of 1974, was a nationwide phenomenon, apparently due to a general economic downturn and to hoarding of boxes by customers during the just-ended period of price controls. (IDF 227, 233; CPF 6–59.) During the demand slump, which lasted through the first quarter of 1975 (CPF 6–59), eastern producers cut back their production even further than did western firms. (IDF 227, 237–38.) Given the large number of eastern medium firms—33—tacit collusion is not a promising explanation of the taking of downtime in the east. It also suggests that other factors better account for western downtime.

Indeed, the more convincing explanation lies in the increases in costs sustained by the industry. The 1974–75 drop in demand came on the heels of the removal of federal price controls in the industry. (IDF 230.) Controls had been imposed on August 15, 1971. Prices were gradually decontrolled over the period March 1973 - June 1974, with the controls being completely lifted on July 1, 1974. (IDF 230.) Judge Mathias found that medium producers' costs—including "energy, wood, wastepaper, and labor costs"—had increased substantially during the price control period, so that once the controls were lifted, the market experienced the effects of "pent-up cost pressures." (IDF 231–32.)[52] Further, costs continued to rise after the controls ended. (IDF 232, 234.) Weyerhaeuser documents confirm substantial increases in variable costs of its medium operations during 1973–75. (CX–109 Z229IC.) [33]

The combination of an increase in costs and a decrease in demand has an indeterminate effect on price in a competitive market. The cost increase tends to exert upward pressure on price, while the demand decrease has the opposite effect. Both factors, however, have the effect of placing downward pressure on the quantity traded. Thus, we cannot fault the west coast producers, on this record, for failing to lower

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the document relied upon by complaint counsel, and the unclear picture in the record of the cost movements, if any, during this time. As to the first point, the Menasha document cited by complaint counsel as proof of a decrease in chip costs in the summer of 1980 (following increases of 1979 and early 1980) speaks literally only to the availability of chips, and does not contain any information about chip costs. (CX 219.) As to the second point, Weyerhaeuser disputes the importance of a decline in OCC costs, which are relevant only to recycled mills. (RAB 53 n.2.)

At any rate, it is clear that any cost disturbance in the summer of 1980 was quickly overcome by the sharp increase in chip prices which occurred later in 1980. (*See* p. 16, *supra.*) It is thus not clear that western prices had time to react to any change in costs during the summer before the effects of the recession had overtaken the industry.

[52] CX–830, a document cited in IDF 232 and challenged by complaint counsel, is not necessary to our finding here.

prices in response to the demand shift of 1974–75, or for cutting production in response to a combination of reduced demand and higher costs.

We also are not moved by the various documents offered by complaint counsel as "smoking gun"-type evidence of tacit collusion during this period. (CAB 37–39, discussing CX–66, CX–68, CX–102.) Standing alone the passages that complaint counsel have culled from these documents suggest a belief on the part of some Weyerhaeuser personnel that some form of tacit coordination was possible during the period in question. When read in context, however, these statements are either ambiguous, or paired with contradictory statements that tend seriously to reduce the weight to be given these documents. For example, complaint counsel have repeatedly cited a 1975 Weyerhaeuser document as an indication that the company views the industry as [34] susceptible to tacit collusion. (*See* CAB at 5, 39, citing CX 68–B,G.) However, the language cited by complaint counsel[53] was taken from a description of the views of some industry participants; the document goes on to reject this view, in favor of a more price-competitive scenario. (RAB 54 n.1.)[54] Moreover, we note that the lifting of price controls and the pressure of cost increases undoubtedly affected Weyerhaeuser's perception of market conditions and its assessment of the costs and benefits to it of taking downtime.

Moving to 1981–82, we note that demand decreased, and output was cut back, nationwide, beginning in the fourth quarter of 1981. (IDF 227, 240, 243.) Weyerhaeuser again admits that it cut production in response to the decrease in demand during that recession. (IDF 240.) The industry's cuts in output, however, [35] were accompanied by discounting from list prices during this period, as explained at pp. 17–18, *supra*. Price cuts and output reductions are, of course, precisely what is expected in a competitive market as a result of a decrease in demand. Complaint counsel's characterization of the 1981–82 period as one of tacit coordination thus fails. Once again, the documents cited as evidence of such coordination do not convince us that this was a serious possibility. (*Compare* CAB 39–40 with RRB p. 96.) The November, 1981, Weyerhaeuser documents cited by complaint counsel (CX–

[53] A September 1975 report of Weyerhaeuser's marketing and economic research office contains the following language:

> Prices have held despite more than a year of extremely weak demand. This shows that the industry has solved its pricing policy problems and learned that in times of weak demand, the optimal strategy is to cut production rather than prices. Each day that prices hold builds confidence that prices will hold and makes the members of the industry more willing to take downtime rather than cut prices. [CX–68G.]

[54] The other Weyerhaeuser documents discussed by complaint counsel convey an ambiguous message, when read in their entirety. Thus, CX–66 discusses downtime as a means of "hold[ing] prices at current levels," but also cautions against "[l]osing [k]ey [m]arket [p]ositions," and forecasts a decrease in box shop margins in 1975–76 "to one half their 1974 levels." Similarly, although CX–102 contains one "scenario" under which "the 1975 [liner] price was assumed to hold," the same scenario forecasts "violent price and demand swings, in the 1975–1980 period" due to "violent swings in GNP" and "the influences of price elasticity."

155, 156) do convey a desire to check price decreases through production cutbacks. However, this desire was not realized during 1982, as Weyerhaeuser was forced to cut its transactions price by approximately 17 percent nationwide, along with other medium producers. This is hardly evidence of a successful round of tacit cooperation.

Given our assessment of the 1974–75 and 1981–82 "downtime" episodes, and the uncontradicted testimonial evidence that these were the only two instances in the last 17 to 19 years in which Weyerhaeuser has taken market-related downtime (IDF 244), we must reject complaint counsel's assertion that the west coast medium industry has already demonstrated cartel-like behavior.

Complaint counsel also attack the industry's use of exchange agreements. (RAB 43–46.) They contend that the agreements make participating medium firms "closely dependent upon one another" (*id.* at 44), and "greatly facilitate [ ] noncompetitive behavior" (*id.* at 46). This danger is said to arise from "effectively eliminating price as a factor in purchase and sale agreements [36] among integrated producers." (*Id.* at 45). As explained earlier, the agreements are generally keyed to OBM prices. The use of OBM prices minimizes the possibility of price information being exchanged between firms in the contracting process. Given that paper industry firms have encountered antitrust problems in the past from the exchange of price information,[55] it is understandable that they might wish to avoid communications as to price, as suggested by industry testimony cited in IDF 103. While we recognize that exchange agreements may sometimes have the effect of facilitating anticompetitive conduct, we also recognize that evaluation of the effects of any particular set of agreements is a difficult task, and that the record here is not well-developed. We thus decline to use the existence of exchange agreements as an argument against the merger under review.

Complaint counsel further contend that the antitrust record of firms in the west coast medium market should be counted as a factor against allowing the North Bend acquisition. They focus specifically on the corrugated container antitrust litigation.[56] (CAB 46–47.) The paper industry's antitrust [37] record does give us pause. None of this litigation, however, involved the medium industry, or the western operations of the defendant companies.[57] The shipping container and containerboard industries were the subject of a grand jury investiga-

[55] *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

[56] Weyerhaeuser and two of its employees were indicted for felony violations of the Sherman Act and two other employees were indicted for misdemeanor violations. Weyerhaeuser and one employee charged with a misdemeanor pled *nolo contendere;* the other employee charged with a misdemeanor and two employees charged with felony violations went to trial and were acquitted. Weyerhaeuser settled the claims of private plaintiffs in companion litigation. *See In re Corrugated Container Antitrust Litigation*, 1981–1 Trade Cas. (CCH) ¶ 64,114 at 76,693, 76,713 (S.D. Tex. 1981).

[57] *Id.* at 76,693.

tion in 1976, and a civil investigation by the Antitrust Division in 1979, but neither investigation resulted in any antitrust action against firms in the medium industry. (RAB 55 n.1, citing RX 1418–21.) While raising some concerns, this antitrust history is insufficient to persuade us that this acquisition will appreciably reduce competition in the west coast medium industry.

We conclude that complaint counsel have placed undue emphasis on the existence of exchange agreements, Weyerhaeuser's "downtime" decisions, and its past antitrust problems, in evaluating the likely effects of the merger.

In support of the acquisition, Weyerhaeuser makes several arguments suggesting that its purchase of the North Bend mill has affirmatively increased competition. First, Weyerhaeuser notes that since 1971 it has pursued a strategy of producing more medium than it requires for its own internal (or exchange) needs, and selling the remainder on the open market. (Tr. 1690–91 (testimony of John H. Waechter).) In this connection, Weyerhaeuser also points to a 15% increase in capacity and concurrent increases in production at North Bend since it [38] acquired the mill. (RAB 8; Tr. 1697 (testimony of John Waechter).)[58]

While increases in capacity and sales are not necessarily inconsistent with the existence of tacit or explicit collusion, we feel that Weyerhaeuser's actions to expand its presence in the open market should be considered as tending to discount the probability of anticompetitive effects from the North Bend acquisition.[59] Such additional supplies to the open market should have the effect of increasing competition for sales; and because the OBM prices on which exchange agreements are based reflect changes in open market prices (with a lag), the price effects of an increase in the amount available on the open market will eventually exert downward pressure on the prices of exchange transactions. Thus, the effects of the merger (and the consequent increase in capacity) should be felt throughout the market, rather than in open market sales alone.

Second, Menasha's competitive significance is less than its 11 percent market share ordinarily would imply.[60] Menasha sold [39] only 4.2 percent of the North Bend mill production in the open market for medium in 1979. (IDF 261.) Moreover, Menasha's CEO testified that

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[58] The hold-separate order specifically provided that Weyerhaeuser could decide to expand the mill during the period covered by the order.

[59] Post-acquisition evidence tending to diminish the probability or impact of anticompetitive effects may be considered in a Section 7 case. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965). We interpret such behavioral evidence with some caution, of course, recognizing that it is within the discretion of the firm involved and that those policies may therefore be changed in the future.

[60] *See General Dynamics, supra* note 47 (fact that acquired firm's coal reserves were already largely committed diminished its competitive significance in the market); 1984 Guidelines, *supra* note 11, at 6879–14 ("market share and market concentration data may either understate or overstate the likely future competitive significance of a firm . . .").

the mill's level of sales to the open market was similar over the previous six years and that it attempted, as a matter of corporate strategy, to match the output of its medium plant to its box plant requirements. (*Id.*)

As indicated, *supra*,[61] we have included captive production and consumption in the relevant market because a collusive price increase may spur vertically-integrated firms to expand output. Because of Menasha's financial constraints, however, it was not a likely candidate for future expansion. The record indicates that Menasha did not have the funds to finance expansion of the plant. (RF 268.) This was due, in large part, to Menasha's status as a privately held firm and recent forced redemptions of shares of its stock. (RF 269.) Prior to this acquisition, Menasha had explored such alternatives as sale of stock to the public, but these options proved infeasible. (RF 272.)

In short, because Menasha's financial circumstances made it doubtful that it would engage in procompetitive capacity expansions, its competitive significance must be discounted.[62]

Our interpretation of the likely effects of Weyerhaeuser's acquisition and expansion of the North Bend mill is reinforced by [40] certain of the testimony from box company managers and box buyers adduced in the course of the administrative hearing. Weyerhaeuser called numerous witnesses from the first group in an attempt to show that, in its words, "complaint counsel are alone in condemning this acquisition." (RAB 2.) Testimony from several representatives of independent (non-vertically integrated) western box shops testified that they supported the acquisition (*id.* at 3–4), as did several representatives from integrated box manufacturers with western box shops but no western medium mills. (*Id.* at 4–6.) The testimony of the independent box shops is substantially tainted by the fact that Weyerhaeuser's post-acquisition agreement with the Association of Independent Corrugated Converters ("AICC") to increase the amount of medium Weyerhaeuser would make available to independent box shops during the period 1980–90 contained a provision that the AICC would notify the Commission that neither it nor its members objected to the North Bend acquisition. (RX 1602.) AICC did send the Commission a letter to that effect. An AICC spokesman testified before the district court in favor of the acquisition and Weyerhaeuser offered the AICC letter in evidence. (RX 1603.) Contracts for the giving of evidence are, of course, highly improper.[63] Even though the contractual agreement

[61] *See*, note 31 *supra* and accompanying text.

[62] *See* 1984 Guidelines, *supra* note 11 at 6879–14 (financial condition of the firm is a factor that may affect competitive influence).

[63] 6A Corbin, *Contracts* Section 1430 (2d ed. 1962); 14 Williston, *Williston on Contracts* Section 1716 (3d ed. 1972); Restatement of Contracts, Second Section 553.

said nothing about testimony at the hearing, we think it best to [41] disregard the independent box shop operators' view of the acquisition.

However, no similar taint attends the testimony of the integrated producers without western medium facilities, who also discounted the probability of anticompetitive effects from the acquisition. We also take note of the testimony of the senior buyer of corrugated containers for Swift & Company, who stated that he did not think the acquisition would have an adverse impact on Swift, or on the box prices paid by it. (Tr. 1159 (testimony of Paul J. Nordstrom).)

In considering this testimony, we do find it significant that complaint counsel did not offer any evidence of opposition to the acquisition, either from the integrated box producers without medium mills in the west, or from customers of the box companies. Although lack of customer complaints is not always a reliable indicator of the competitive effect of an acquisition, the fact that the representatives from groups likely to be harmed by any diminution of competition in the western market in fact have only testified in support of the acquisition suggests to us, in this case, that Weyerhaeuser's move into North Bend is unlikely to promote collusion.

3. Entry

The Commission considers entry conditions to be the most important of the array of market characteristics considered in addition to market concentration figures.[64] In a recent decision, the Commission adopted the following definition of an [42] entry barrier: "additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms."[65] The decision further explains that

> Unless there is a barrier to entry, as defined above, market power cannot be exercised indefinitely. Sooner or later, new firms will enter the market and drive prices back down to competitive levels. From the standpoint of the public, however, it makes a great deal of difference whether this occurs sooner or later. There may be little practical difference between an absolute barrier to entry and conditions of entry that delay the restoration of competitive prices for decades.
>
> Therefore, we will also consider a second type of barrier to entry, which might more accurately be called an impediment to entry. An impediment to entry is any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim.[66]

We consider here both the ability of new firms to enter the west coast market and the ability of existing firms to expand their

[64] *Echlin Mfg. Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,268 at 23,300 (105 F.T.C. 410, June 28, 1985).
[65] *Id.* at 23,301.
[66] *Id.* at 23,302.

output.[67] As to the former, we generally accept the ALJ's findings that no cognizable barriers to entry exist in the form of capital costs, scale economies, environmental restrictions, limited access to mill sites and raw materials, or differentially higher costs for new mills. (IDF 195–201, 205–211.) While there [43] has been no new entry in the west coast region since 1974, two large plants have recently come on-stream in the east: International Paper's Mansfield, Louisiana complex commenced operation in November 1981 (WX 1200jj-B), and MacMillan Bloedel's Pinehill, Alabama facility started up in November 1982 (Tr. 909 (testimony of Edward E. Locke, of MacMillan Bloedel, Inc.)). Thus, new plant construction appears to be a viable competitive strategy. However, further attention must be paid the time required for so-called "greenfield" entry.

The ALJ found that semichemical or recycled mills "can be built within the approximate time frame of two years used [to evaluate new entry] in the [Justice Department Merger] *Guidelines.*" (IDF 204.) Complaint counsel attack this finding, arguing that the ALJ concentrated on the *construction* time involved, and ignored the time periods required to develop plans for a new mill, select a mill site, complete preliminary design work, prepare and submit environmental studies and applications for environmental permits, and the like. (CAB 50–51.) Complaint counsel forecast time periods of "up to five years" "between the formulation of the initial idea for a new medium mill and the commencement of efficient production at new capacity." (*Id.* at 51.)

Our review of the evidence concerning the time needed for greenfield entry convinces us that the ALJ overlooked significant and time-consuming pre-construction steps that must be taken to construct a new mill. The total time necessary for the planning and construction of the new International Paper and MacMillan [44] Bloedel mills mentioned above appears to have been approximately four to four-and-one half years. (CPF 5–14 through 5–20.) Given these facts, we concluded that the time required for greenfield entry constitutes a sufficient "impediment to entry" in this industry that we will not consider as significant the effect of possible greenfield entry as a deterrent to the exercise of market power by incumbent firms.[68]

The second form of entry considered here—capacity expansion by

[67] *See Grand Union, supra* note 11, 102 F.T.C. at 1064–66 & n. 74; *Heublein, Inc.*, 96 F.T.C. 385, 589 (1980); 1984 Guidelines, *supra* note 11, at 6879–15 n. 20 (expansion of fringe firms considered a form of entry).

[68] We do not find that the period constituting a significant impediment to entry here would necessarily be a significant impediment in all cases. The relevant period may be either longer or shorter than this. The impact of potential new entry in restraining the exercise of market power in a given market may be related to other economic characteristics of the industry, in addition to the requisite time for entry. Such characteristics may include the longevity of the plant, the minimum efficient scale of entry relative to total industry capacity, the duration of supply contracts customary in the industry, as well as other factors.

fringe firms currently in the market[69]—is, obviously, not subject to the same delays as the construction of a wholly new facility. Indeed, the record is clear that existing facilities may be upgraded fairly easily, and at relatively low cost. (IDF 150, 218.) Several examples of such upgrading in the west coast market are available: Menasha's 1976–77 expansion of, and Weyerhaeuser's post-acquisition investments in, the North Bend mill, and Willamette's expansion of its Port Hueneme, [45] California mill. (IDF 218.) West coast capacity expansions are also evident in the subpoena responses of Georgia-Pacific Corporation (CX 319–D) and Container Corporation (CX 312–D). In all, nine of the twelve west coast producers reported expansions in capacity during the period 1977–82. (CPF p. 96, Table V–3.)

Complaint counsel do not dispute the possibility of such expansion or the fact that such expansion has occurred. Rather, they argue that the firms in the west coast market will be party to a "collusive arrangement" that will include an agreement not to expand capacity, and that, at any rate, the smaller, fringe firms are "at an economic disadvantage relative to the larger producers with respect to expanding the capacity of their mills." (CAB 52.)

We do not view tacit or express collusion as an easy matter in this market, given the number and size distribution of the firms involved. We do not view this acquisition as significantly affecting the probability that an explicit conspiracy could be formed as to capacity expansion in this market. Moreover, tacit collusion is obviously potentially subject to disruption by fringe firms. This would seem to be especially true of tacit coordination regarding something as complex as capacity expansion. The possibility of "cheating" through modifying existing facilities would in all likelihood prove too tempting to fringe firms.

We think that complaint counsel underestimate the ability of the fringe firms to expand in the event of a collusive price increase. Complaint counsel's assertions as to these firms' [46] disadvantage is based on the smaller width of the machines used by Louisiana-Pacific, Inland, Newark and Specialty Paper. (IDF 218 & n. 24.) First, not all of the smaller firms are constrained in this way.[70] Moreover, there appear to be a number of alterations that can be made to any medium mill, regardless of the width of the machines used. (Tr. 2278–87 (testimony of E.J. Justus) (industry consultant)). For example, elimination of bottlenecks in the production process, addition of horsepower to the pulping and cleaning equipment, improvements to the press

[69] Collusion among the leading firms in a market can be defeated if fringe firms can expand output sufficiently to offset output reductions by the colluding sellers. Although smaller firms in the market ordinarily have relatively more to gain from such behavior, we do not entirely discount the possibility of one or more moderately-sized firms attempting to gain market share by modifying existing facilities.

[70] For example, Boise Cascade has less than eight percent of the market, *see* p. 28, *supra*, but its machines do not have the size disadvantage asserted by complaint counsel.

section, and installation of an extended nip press appear to be alterations available to mills across the board. (*Id.*) In fact, three of the firms characterized by complaint counsel as unlikely to expand because of machine width did, in fact, expand during 1977–82. (*Compare* IDF 218 & n.24 *with* CPF p. 96, Table V–3.)

The importance of fringe capacity expansion in this industry is underscored by the fact that the targets of any collusive behavior—independent box shops and those integrated box firms with western box shops but no western medium mills—would have every incentive to seek lower cost sources of supply in the event of a collusive price increase, and could easily present smaller medium firms with a good reason for expanding their capacity and output. We therefore consider the possibility of expanded output by fringe firms in the market to be a significant factor limiting the possibility of anticompetitive behavior. [47]

4. Eastern Firms as "Near Competitors"

Finally, we consider the fact that eastern producers clearly would enter on an significant scale if west coast prices increased substantially. Testimony adduced at the hearing suggests a large eastern response would occur if the east-west price differential widened to $45–$50. (Tr. 988 IC (testimony of Edward Locke); 2343, 2346–47 IC (testimony of Alfred Perry of Continental Forest); and 2494–95 IC (testimony of Michael Brown of International Paper).) Given the state of the record, specifically the confusing evidence as to the price differential at the time the record closed, we are unable to say by what percentage the western price would have to increase to trigger this response, although it appears to be somewhere in the range of 6 to 12 percent.

Even though we have defined the geographic market to exclude eastern producers, this does not require us to blind ourselves to the reality that, at some price, eastern supply would be forthcoming. While the definition of relevant markets requires the drawing of "bright lines" for the inclusion and exclusion of goods and firms, our analysis should not ignore competitive influences at the margin, though outside the "bright lines." Where, as here, there is a significant competitive presence reasonably close to the bright line, we will give some consideration to that presence, rather than strictly follow an [48] "all or nothing" approach.[71] This presence could exert, at the limit, a restraining influence on western prices. In any event, it would

[71] 1984 Guidelines, *supra* note 11, at 6879–16 (discussing consideration of "next-best substitutes"); Alpert & Kitt, *Is Structure All?*, 53 Antitrust L.J. 255, 264–66 (1984) (suggesting consideration of "near competition" from firms or products outside the defined market).

limit the amount of harm that could be done through any exercise of market power in the west.

III. CONCLUSION

In light of a number of characteristics of the western medium market—the presence of eleven incumbent firms, the potential for fringe firms to expand their productive capacity relatively easily, the output-expanding policies followed by Weyerhaeuser with respect to the North Bend facility, the lack of opposition to the acquisition from firms likely to be affected by any anticompetitive behavior, and the presence of "near competition" from the eastern mills—we cannot find that the effect of the challenged acquisition "may be substantially to lessen competition, or to tend to create a monopoly." The Commission therefore dismisses the complaint in this matter in all respects.

Final Order

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain the initial decision. Complaint counsel's appeal is denied. Accordingly,

It is ordered, That the complaint is dismissed.

Commissioners Bailey and Calvani did not participate.

IN THE MATTER OF

MEDICAL STAFF OF JOHN C. LINCOLN HOSPITAL & HEALTH CENTER

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3166. Complaint, Sept. 26, 1985—Decision, Sept. 26, 1985

This consent order requires an unincorporated association of physicians and other practitioners who have been granted privileges by John C. Lincoln Hospital & Health Center in Phoenix, Ariz. to admit and attend patients, among other things, to cease threatening or participating in any: (1) boycott or concerted refusal to deal, including a refusal to refer, admit or treat patients; (2) unreasonably discriminatory action against a health care facility or professional; or (3) coercive action to influence any reimbursement or insurance determination, if the purpose or effect of such conduct would be to impede the development or operation of an urgent care center or other health care facility or institution in the Arizona counties of Maricopa, Pinal, Yavapai or Gila. Respondent is not prohibited from participating in any policy-making or medical review activities at the hospital, when such conduct does not constitute, and is not part of, a boycott or refusal to deal. Additionally, respondent is required to file compliance reports with the Commission at specified times and provide copies of the complaint and order to all present and future members of the Medical Staff.

Appearances

For the Commission: *Raymond L. Randall* and *Nina B. Hale.*

For the respondents: *Gerald A. Gaffaney, Mariscal, Weeks, McIntyre & Friedlander,* Phoenix, Ariz.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. John C. Lincoln Hospital & Health Center (hereinafter "Lincoln Hospital" or "the Hospital") is a nonprofit corporation organized and existing under the laws of the State of Arizona and operating a general acute care hospital. The principal physical facili-

ties of Lincoln Hospital are located at 9211 North Second Street, Phoenix, Arizona.

PAR. 2. Respondent Medical Staff of John C. Lincoln Hospital & Health Center (hereinafter "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Arizona, and is located at Lincoln Hospital, Phoenix, Arizona. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at Lincoln Hospital.

PAR. 3. Most, if not all, of the members of the Medical Staff are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and other health care providers in the Phoenix metropolitan area.

PAR. 4. The Medical Staff's purposes include providing the organizational structure through which the "benefits of membership on the Staff may be obtained by individual practitioners" and providing "a means through which the Medical Staff may participate in the Hospital's policy-making and planning process." By virtue of its purposes and activities, the Medical Staff is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 5. In the course and conduct of their businesses and professions, physicians in the Phoenix metropolitan area charge fees and collect payments that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers, and other payers. The flow of said funds is affected by competition among physicians in the Phoenix metropolitan area and by the acts and practices of the Medical Staff and its members as hereinafter alleged. Said acts and practices are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. In December 1982, the Board of Directors of Lincoln Hospital announced its plan to operate an urgent care center approximately three miles south of the hospital. The urgent care center, which opened on March 21, 1983, was designed to provide treatment to patients with urgent, but not life-threatening, conditions without the need for an appointment.

PAR. 7. Beginning in January 1983, the Medical Staff, acting as a combination of its members or in conspiracy with at least some of its members or others, joined in a common plan to coerce, intimidate, and threaten to boycott Lincoln Hospital in order to induce cancellation of the Hospital's involvement with any urgent care center in competition with members of the Medical Staff.

PAR. 8. The Medical Staff and members of the Medical Staff engaged in the following conduct, among other things, in furtherance of the aforesaid combination or conspiracy:

A. At a special meeting of the Medical Staff's Executive Committee on January 31, 1983, physicians of the Executive Committee and the Medical Staff's Family Practice Department expressed "concern" about the "impossibility" of their continuing to "support" with admissions a hospital engaged in competition with them and adopted a resolution that Lincoln Hospital should not engage in the "corporate practice of medicine" in "competition with private physicians who support the hospital."

B. On February 3, 1983, the Medical Staff Executive Committee, which is empowered to represent and act on behalf of the Medical Staff, voted that the Hospital's plans for the urgent care center were "not acceptable" to the Medical Staff.

C. On March 29, 1983, a member of the Medical Staff transmitted to each member of Lincoln Hospital's board of directors a document, which he claimed reflected the attitude of Medical Staff members, that (1) criticized the planned urgent care center and (2) stated that physicians would "take their patients (and their patient-generated revenues) to a friendlier competing facility."

D. On March 31, 1983, the Medical Staff Executive Committee voted that the Hospital should close the urgent care center.

E. On April 11, 1983, a Medical Staff member wrote to every Lincoln Hospital board member that Lincoln Hospital could "ill afford" any "alienation" of its Medical Staff in light of a new competing hospital being opened nearby, and cited an attached "position paper" adopted by the Maricopa County Medical Society recommending that physicians "not support" facilities that engage in "unfair competition" with them and that physicians should "stand together" as "admitters" of patients to such hospitals.

F. In April 1983, other members of the Medical Staff wrote letters to the members of the Lincoln Hospital board resigning from the Medical Staff or threatening to cease admitting patients to the Hospital because of the Hospital's operation of the urgent care center.

PAR. 9. On April 15, 1983, as a result of the aforesaid combination or conspiracy and conduct, the Hospital announced the closing of its urgent care center.

PAR. 10. The purposes or effects and the tendency and capacity of the combination or conspiracy and acts and practices described in Paragraphs Seven and Eight are and have been to restrain trade unreasonably and hinder competition in the provision of health care

services in the Phoenix metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Patients have been limited in their ability to choose among a variety of alternative types of health care facilities competing on the basis of price, service, and quality;

B. Other hospitals may be deterred from operating similar facilities that might compete with the private practices of physicians on medical staffs;

C. The development of a competitive, convenient, cost-effective and innovative form of health care facility has been hindered;

D. Lincoln Hospital's ability to compete with other hospitals in the Phoenix metropolitan area has been restrained.

PAR. 11. The combination or conspiracy described above constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or conspiracy is continuing and will continue absent the entry against Respondent of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Medical Staff of John C. Lincoln Hospital & Health Center is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business located at 9211 North Second Street, in the city of Phoenix, State of Arizona.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. *Respondent* or *the Medical Staff* means the Medical Staff of John C. Lincoln Hospital & Health Center, its officers, committees, representatives, delegates, agents, employees, successors, or assigns. The Medical Staff is an unincorporated association of physicians and other practitioners who have been granted privileges by John C. Lincoln Hospital & Health Center to admit and attend patients in John C. Lincoln Hospital & Health Center.

B. *Lincoln Hospital* means John C. Lincoln Hospital & Health Center, a non-profit corporation organized and existing under and by virtue of the laws of the State of Arizona that operates a general acute care hospital.

C. *Urgent care center* means a freestanding health care delivery facility that is designed and staffed to provide treatment to patients with non-life threatening, but nevertheless urgent, conditions on a non-appointment, episodic basis.

D. *Corrective action* means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with clinical privileges at Lincoln Hospital who fails to provide evidence of eligibility to purchase malpractice insurance or whose activities or professional conduct are detrimental to patient safety, the delivery of quality patient care, or are unreasonably disruptive to the operation of Lincoln Hospital.

II.

It is ordered, That Respondent shall cease and desist from, directly or indirectly or through any device:

A. Making, or joining in any plan to make, any express or implied threat of any unreasonably discriminatory action against a health care facility, institution, or professional, any coercive action to influence any reimbursement or insurance determination, or any boycott or concerted refusal to deal, including a refusal to refer, admit, or treat patients, or

B. Suggesting, encouraging, initiating, engaging in, or participating in any unreasonably discriminatory action against a health care facility, institution, or professional, any coercive action to influence any reimbursement or insurance determination, or any boycott or concerted refusal to deal, including a refusal to refer, admit, or treat patients,

for the purpose of, or with the effect or likely effect of, impeding the development or operation of an urgent care center or other health care facility or institution in the Arizona counties of Maricopa, Pinal, Yavapai, or Gila.

III.

It is further ordered, That this order shall not be construed to prohibit Respondent or its members from engaging, pursuant to the Medical Staff's bylaws, in credentialling, corrective action, utilization review, quality assurance, peer review, or hospital policy-making activities at Lincoln Hospital, where such conduct neither constitutes nor is part of any boycott, concerted refusal to deal, discrimination, or coercion, the purpose, effect, or likely effect of which is to impede unreasonably the development or operation of an urgent care center or any other health care facility or institution.

IV.

It is further ordered, That this order shall not be construed to prevent Respondent from exercising rights guaranteed against infringement by the First Amendment of the United States Constitution, including the right to petition any federal or state executive, legislative, judicial, or administrative agency or body, concerning legislation, rules, regulations, or procedures, or from engaging in any

activities which are exempt from the antitrust laws under the state action doctrine or the *Noerr-Pennington* Doctrine.

V.

It is further ordered, That Respondent shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to each officer and to each physician who is a member of the Medical Staff on that date, and, for a period of five (5) years after that date, provide a copy of such order and complaint to each physician who becomes a member of the Medical Staff.

B. Within one hundred and twenty days (120) after this order becomes final, and at such other times as the Commission may by written notice to the Respondent require, file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

C. In addition to the report required by Section V.B., within one year after this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, and at such other times as the Commission may by written notice require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the Medical Staff has complied and is complying with this order.

D. For a period of five years after this order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order

VI.

It is further ordered, That the Respondent notify the Commission at least thirty (30) days prior to any proposed change in the Medical Staff that may affect compliance obligations arising out of this order.

IN THE MATTER OF

HOSPITAL CORPORATION OF AMERICA

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3167. Complaint, Sept. 30, 1985—Decision, Sept. 30, 1985

This consent order requires a Nashville, Tenn. for-profit hospital chain, among other things, to divest three of the hospitals it acquired from Forum Group, Inc. to Commission-approved acquirers within 12 months after the order becomes final. If respondent cannot divest within the time specified, the Commission will appoint a trustee to make the divestitures. Respondent is prohibited from reacquiring the assets of any of the divested hospitals for 10 years without prior Commission approval. Additionally, respondent is required to provide advance notification to the Commission before acquiring any psychiatric hospital or unit, or any general acute care hospital operating a psychiatric unit, in the Norfolk, Va., area, or any general acute care hospital in the Midland/Odessa, Tex. area, unless such acquisition price does not exceed one million dollars ($1,000,000). Further, respondent is required to file compliance reports with the Commission at specified times and make records available to Commission staff.

Appearances

For the Commission: *Raymond L. Randall, Oscar M. Voss, Nina B. Hale* and *Linda M. Brody.*

For the respondents: *William D. Iverson* and *G.M. Chester, Jr., Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Hospital Corporation of America, a corporation subject to the jurisdiction of the Federal Trade Commission, has, through an acquisition of assets and voting securities, acquired several hospitals from Forum Group, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *HCA* means Hospital Corporation of America and its subsidiaries.

(b) *Forum* means Forum Group, Inc. and its subsidiaries.

(c) *Hospital* means a health facility, other than a federally-owned facility (such as a military or Veterans Administration hospital), having a duly organized governing body with overall administrative responsibility and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

(d) *General acute care hospital* means a hospital which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

(e) *Psychiatric hospital* means a hospital which has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(f) *Psychiatric unit* means a department, unit, or other organizational subdivision of a general acute care hospital that has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(g) *Norfolk MSA* means the Norfolk-Virginia Beach-Newport News, Virginia Metropolitan Statistical Area, as defined by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President as of January 1, 1985.

(h) *Midland/Odessa Area* means the area comprising Ector and Midland counties in Texas.

II. RESPONDENT - HOSPITAL CORPORATION OF AMERICA

2. HCA is a corporation organized and doing business under the laws of the State of Tennessee with its office and principal place of business located at One Park Plaza, Nashville, Tennessee.

3. HCA is primarily engaged in the operation and management of hospitals in the United States and in foreign countries. HCA is the largest for-profit hospital chain in the United States. It owns, leases, or manages more than 350 general acute care hospitals in over 40 States, and more than 25 psychiatric hospitals in over 10 States. In 1983, its revenues from domestic hospital operations exceeded $3.7

billion. By virtue of its activities, HCA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the jurisdiction of the Federal Trade Commission.

4. At all times relevant herein, HCA has been and is now engaged in activities that are in or affect commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business activities are in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. HCA does business in a number of States and foreign countries. HCA in general, and the hospitals it owns or manages in the Norfolk MSA and the Midland/Odessa Area in particular, engage in interstate commerce.

III. THE ACQUISITION

5. On or about October 12, 1984, HCA entered into an agreement under which HCA would acquire from Forum most of Forum's general acute care hospitals and psychiatric hospitals through the purchase of certain assets and related voting securities for approximately $195 million. Consummation of this acquisition (hereinafter "the acquisition") was completed on April 2, 1985.

6. Forum is a for-profit corporation organized and doing business under the laws of the State of Indiana with its office and principal place of business located at 8900 Keystone Crossing, Indianapolis, Indiana.

7. Prior to the acquisition, Forum owned general acute care hospitals and psychiatric hospitals in at least seven States. Forum also owns and operates nursing homes, facilities for the developmentally disabled, and retirement living complexes. Its fiscal 1984 operating revenues were approximately $110 million. By virtue of its activities, Forum is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the jurisdiction of the Federal Trade Commission.

8. At all times relevant herein, Forum has been and is now engaged in activities that are in or affect commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business activities are in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Forum does business in a number of States. Forum in general, and the hospitals it owned in the Norfolk MSA and the Midland/Odessa Area in particular, engage in interstate commerce.

IV. COUNT I: PSYCHIATRIC HOSPITAL SERVICES—THE NORFOLK MSA

Trade and Commerce

9. The allegations of Paragraphs 1 through 8, inclusive, of this complaint are hereby incorporated by reference.

10. One relevant product market in which to evaluate the effects of the acquisition is psychiatric services provided by psychiatric hospitals and psychiatric units, excluding long-term treatment of chronic mental illness, and also excluding such treatment and other services provided by Federally-owned facilities and State mental hospitals ("psychiatric hospital services").

11. One relevant geographic market in which to evaluate the effects of the acquisition is the Norfolk MSA.

12. Among the hospitals HCA acquired from Forum were two psychiatric hospitals in the Norfolk MSA, Virginia Center for Psychiatry - Portsmouth in Portsmouth, Virginia, and Virginia Center for Psychiatry - Norfolk in Norfolk, Virginia.

13. At the time HCA acquired these hospitals, HCA already owned and operated a psychiatric hospital in the Norfolk MSA, Peninsula Hospital in Hampton, Virginia.

14. Prior to the acquisition, HCA and Forum were competitors in the psychiatric hospital services market in the Norfolk MSA.

15. At the time of the acquisition, HCA's Peninsula Hospital had approximately a 15 percent share of the psychiatric hospital services market in the Norfolk MSA based on licensed psychiatric beds and approximately a 12 percent share of the market based on the number of patient days of inpatient psychiatric care provided in 1983 ("1983 psychiatric patient days"). HCA's market share after the acquisition of the two psychiatric hospitals identified in paragraph 12 above increased to approximately 45 percent based on licensed psychiatric beds, an increase of 30 percent, and approximately 38 percent based on 1983 psychiatric patient days, an increase of 26 percent.

16. Prior to the acquisition, the psychiatric hospital services market in the Norfolk MSA was already concentrated. Concentration increased substantially as a result of the acquisition. The Herfindahl-Hirschman Index ("HHI") increased approximately 890 points, from approximately 1700 to approximately 2590, based on the number of licensed psychiatric beds. The HHI increased approximately 460 points, from approximately 1590 to approximately 2050, based on 1983 psychiatric patient days.

17. Barriers to entry into the psychiatric hospital services market in the Norfolk MSA are high. These barriers include, among other things, the requirement under the Virginia health planning laws, *Va. Code* Section 32.1–102.1 *et seq.*, that State government approval be

obtained prior to entry into the market. Because State government health planning officials project that, for purposes of health planning law implementation, the capacity of existing firms will likely exceed estimated demand for the foreseeable future, it is unlikely that such approval will be granted for new entry into the market in the foreseeable future.

Effects of the Acquisition

18. The effects of HCA's acquisition of the two Forum psychiatric hospitals in the Norfolk MSA may be substantially to lessen competition in the psychiatric hospital services market in the Norfolk MSA in, among others, the following ways:

(a) actual competition between HCA and Forum in the relevant market has been eliminated;
(b) Forum has been eliminated as a substantial independent competitor in the relevant market; and
(c) actual competition among the remaining competitors in the relevant market may be lessened.

Violation Charged

19. The acquisition of Virginia Center for Psychiatry - Portsmouth and Virginia Center for Psychiatry - Norfolk by HCA constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

V. COUNT II: GENERAL ACUTE CARE HOSPITAL SERVICES—THE MIDLAND/ODESSA AREA

Trade and Commerce

20. The allegations of Paragraphs 1 through 8, inclusive, of this complaint are hereby incorporated by reference.
21. One relevant product market in which to evaluate the effects of the acquisition is general acute care hospital services.
22. One relevant geographic market in which to evaluate the effects of the acquisition is the Midland/Odessa Area in Texas.
23. Among the hospitals HCA acquired from Forum was Parkview Hospital, a general acute care hospital in Midland, Texas, as well as a planned new facility in Midland that, if and when it is completed, will be named "Doctors' Hospital of the Permian Basin" and will replace Parkview Hospital. (These two facilities will be hereinafter referred to collectively as "Parkview".)
24. At the time HCA acquired Parkview, HCA was already operating under a management contract one of the three other general

acute care hospitals in the Midland/Odessa Area, Medical Center Hospital in Odessa, Texas. Pursuant to the management contract, HCA manages the day-to-day operations of the hospital. HCA's specific responsibilities under the contract include, among other things, providing to the hospital an administrator and controller (both of whom serve as employees of HCA, as well as the hospital); making recommendations to the hospital's Board of Managers regarding hospital charges, capital improvements, and changes in the scope of services offered by the hospital; assisting in preparation of the hospital's budget, and its short-, medium-, and long-term plans; making recommendations regarding recruiting, hiring, firing, training, promotion, and assignment of, and compensation for, hospital employees; providing HCA staff consultants to the hospital as necessary; obtaining necessary licenses and permits for the hospital; and making recommendations for maintaining the hospital's compliance with accreditation standards and government regulations. As a result of its contractual relationship with the hospital, HCA has a significant role in determining the manner in which Medical Center Hospital competes with other hospitals.

25. Prior to the acquisition, HCA and Forum were competitors in the general acute care hospital services market in the Midland/Odessa Area.

26. At the time of the acquisition, Medical Center Hospital had approximately a 50 percent share of the general acute care hospital services market in the Midland/Odessa Area based on licensed general acute care beds and approximately 55 percent of the market based on the number of 1983 inpatient days. After the acquisition of Parkview, HCA controlled, either through ownership or management contract, hospitals with a combined share of 58 percent of the relevant market based on licensed general acute care beds, an increase of 8 percent, and approximately 60 percent based on 1983 inpatient days, an increase of 5 percent.

27. Prior to the acquisition, the general acute care hospital services market in the Midland/Odessa Area was already highly concentrated. Concentration increased substantially as a result of the acquisition. The HHI increased approximately 820 points, from approximately 3530 to approximately 4350, based on the number of licensed general acute care beds. The HHI increased approximately 560 points, from approximately 3990 to approximately 4550, based on 1983 inpatient days.

28. Barriers to entry into the general acute care hospital services market in the Midland/Odessa Area are substantial. Significant time delays, substantial excess capacity in the market, and other obstacles may impede or discourage new entrants into the market. It is unlike-

ly, for at least a substantial time period, that new entry will deter or prevent collusive or other anticompetitive conduct in the market.

Effects of the Acquisition

29. The effect of HCA's acquisition of Parkview from Forum may be substantially to lessen competition in the general acute care hospital services market in the Midland/Odessa Area in, among others, the following ways:

(a) actual competition between HCA and Forum in the relevant market has been eliminated;
(b) Forum has been eliminated as a substantial independent competitor in the relevant market; and
(c) actual competition among the remaining competitors in the relevant market may be lessened.

Violation Charged

30. The acquisition of Parkview by HCA constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Hospital Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at One Park Plaza, in the City of Nashville, State of Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For purposes of this order, the following definitions shall apply:

A. *HCA* means Hospital Corporation of America, a corporation organized under the laws of Tennessee, with its principal executive office at One Park Plaza, Nashville, Tennessee, and its directors, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. *Forum* means Forum Group, Inc. and its subsidiaries, divisions, affiliates, successors, and assigns.

C. *Hospital* means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative responsibility and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

D. *General acute care hospital* means a hospital which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. *Psychiatric hospital* means a hospital which has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

F. *Psychiatric unit* means a department, unit, or other organizational subdivision of a general acute care hospital that has as a primary function the provision of inpatient services for psychiatric

diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

G. *Norfolk MSA* means the Norfolk-Virginia Beach-Newport News, Virginia Metropolitan Statistical Area, as defined as of January 1, 1985 by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

H. *Midland/Odessa Area* means the area comprising Ector and Midland counties in Texas.

I. *Acquire* a hospital or psychiatric unit means to directly or indirectly acquire all or any part of the stock or assets of a hospital or psychiatric unit, or enter into any other arrangement by which HCA obtains direct or indirect ownership of, or otherwise begins to operate, a hospital or psychiatric unit; *provided, however,* that if an order is issued and becomes final in *Hospital Corporation of America,* FTC Docket No. 9161 [106 F.T.C. 361 (1985)], that requires HCA to obtain the prior approval of, or provide advance notification to, the Federal Trade Commission with respect to any hospital management contracts, then as of that date, *operate a hospital or psychiatric unit* shall be deemed to include management of a hospital or a psychiatric unit pursuant to a management contract.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, HCA shall divest, absolutely and in good faith, all of the stock and assets specified in Schedule A. The purpose of the divestitures is to reestablish the hospitals listed in Schedule A as viable competitors. The divestitures shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, whether by HCA or by a trustee as provided for in Section III below, HCA shall continue to operate the facilities to be divested, and take all measures necessary to maintain those facilities in their present condition and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested so as not to impair their present operating abilities or market value.

For a period of ten (10) years from the date this order becomes final, HCA shall not, directly or indirectly, reacquire any interest in any Schedule A stock or assets required to be divested by this Section II of this order without the prior approval of the Federal Trade Commission.

III.

A. If HCA has not divested all of the properties, assets, or enterprises required to be divested pursuant to Section II of this order within the 12-month period provided therein, the Federal Trade Commission may select a trustee to effect any ordered divestitures yet to be accomplished. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If the Federal Trade Commission should elect to appoint a trustee, it shall not be precluded from seeking civil penalties and other relief available to it for any failure by HCA to comply with this order. If the Federal Trade Commission should not elect to appoint a trustee under this Section III of this order, it shall not be precluded from seeking civil penalties, the appointment by the courts of a trustee to effect the divestitures, and other relief available to it, for any failure by HCA to comply with this order.

B. Any trustee appointed by the Federal Trade Commission pursuant to this Section III shall have the following powers, authority, duties, and responsibilities:

1. The trustee shall have the exclusive power and authority to divest any properties, assets, or enterprises required to be divested pursuant to Section II of this order that have not been divested by HCA within the time period for the divestitures provided therein. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures, which shall be subject to the prior approval of the Federal Trade Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Federal Trade Commission. In addition, any delays in divestiture caused by HCA shall extend the time for divestiture in accordance with the delay caused.

2. The trustee shall have full and complete access to the personnel, books, records and facilities of any property, asset, or enterprise that the trustee has the duty to divest, and HCA shall develop such financial or other information relevant to the properties, assets, or enterprises to be divested as the trustee may reasonably request. HCA shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

3. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest and the purposes of the divestitures as stated in Section II of this order.

4. The trustee shall serve, without bond or any other security, at the cost and expense of HCA on such reasonable and customary terms and conditions as the Federal Trade Commission may set. The trustee shall have authority to retain, at the cost and expense of HCA, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestitures. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Federal Trade Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to HCA and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

5. HCA shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Federal Trade Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, negligence, or the willful or wanton acts or bad faith of the trustee.

6. Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, HCA shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause the divestitures.

7. If the trustee ceases to act or fails to act diligently, the Federal Trade Commission shall appoint a substitute trustee.

8. The trustee may ask the Federal Trade Commission to issue, and the Federal Trade Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the divestitures required under this order.

9. The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, or enterprises required to be divested pursuant to Section II of this order.

10. The trustee shall report in writing to HCA and the Federal Trade Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, HCA shall not, without providing advance

notification to the Federal Trade Commission, acquire: (1) any psychiatric hospital, any psychiatric unit, or any general acute care hospital operating a psychiatric unit, in the Norfolk MSA; or (2) any general acute care hospital in the Midland/Odessa Area. Such advance notification shall be provided when HCA executes a letter of intent or enters into an agreement to make such an acquisition, whichever is earlier.

The notification required by this section shall be the Notification and Report form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that Part. This notification requirement shall apply to HCA and shall not apply to any party that HCA seeks to acquire. HCA shall also provide at the same time of the filing of the Notification and Report Form supplemental information, either in HCA's possession or reasonably available to HCA, relating to the hospital to be acquired, the HCA hospital(s) in that geographic area, and identification and assessment of the area hospital market, as specified in Schedule B. In addition, HCA shall comply with reasonable requests by Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, That no acquisition shall be subject to the notification requirements of this section: (1) if the acquisition is by purchase, and the consideration paid for the hospital or any rights or interest therein, including assumption by HCA of any liabilities, does not exceed one million dollars ($1,000,000); or (2) if notification of the acquisition is required to be made, and in fact is made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That HCA shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Section II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may reasonably request, a summary of all contacts and negotiations with potential purchasers of the stock, assets, or other rights or interests to be divested under this order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

VI.

It is further ordered, That HCA, upon written request of the Secretary of the Federal Trade Commission or the Director of the Bureau of Competition of the Federal Trade Commission made to HCA at its principal office, for the purpose of securing compliance with this order, and for no other purpose, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Federal Trade Commission:

1. reasonable access during the office hours of HCA, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in HCA's custody, possession or control that relate materially and substantially to any matter contained in this order; and

2. an opportunity, subject to the reasonable convenience of HCA, to interview officers or employees of HCA, who may have counsel present, regarding such matters.

VII.

It is further ordered, That HCA shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this order.

SCHEDULE A: STOCK AND ASSETS TO BE DIVESTED

A. All stock, and all assets (including, but not limited to, properties, licenses, land, and other rights and privileges, tangible or intangible), acquired by HCA directly or indirectly from Forum in connection with any of the following hospitals:

1. Parkview Hospital, in Midland, Texas;
2. Doctors' Hospital of the Permian Basin, in Midland, Texas (a planned new facility which, if and when it is completed, will replace Parkview Hospital);
3. Virginia Center for Psychiatry - Norfolk, in Norfolk, Virginia; and
4. Virginia Center for Psychiatry - Portsmouth, in Portsmouth, Virginia,

including specifically all stock of Doctors' Hospital Permian Basin, Inc. (a Texas corporation), and whatever assets may have been acquired by HCA directly or indirectly from that corporation, from Midland Hospital Corporation (a Texas corporation), or from Norfolk Psychiatric Center, Inc. or Portsmouth Psychiatric Center, Inc. (both Virginia corporations).

B. All improvements made to the hospitals and related assets specified in paragraph A above subsequent to their acquisition by HCA.

SCHEDULE B: SUPPLEMENTAL INFORMATION TO ACCOMPANY NOTIFICATION OF A HOSPITAL ACQUISITION

The supplemental information HCA is required to submit with its notification to the Federal Trade Commission of a hospital acquisition, pursuant to Section IV of this order, shall include a full description of the acquisition (including a copy of the acquisition agreement), to the extent such information is not already provided in the Notification and Report form submitted by HCA, and shall also include, where available, patient flow data, annual management and strategic plans, hospital utilization and revenue data, and documents relating to market share, formulation of hospital prices, competitive interaction among area hospitals, implementation of certificate of need standards in the area, planned efficiencies, relations with third-party payers, and physician admitting patterns.

IN THE MATTER OF

INTERNORTH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3168. Complaint, Sept. 30, 1985—Decision, Sept. 30, 1985

This consent order requires InterNorth, Inc. (INI), the Omaha, Neb. acquirer of the Houston Natural Gas Corporation, among other things, to divest within 12 months from the date of the order to a Commission-approved buyer, all the properties listed on Schedule A, and to terminate all rights and obligations it may have on the contracts listed on Schedule B. Should INI fail to complete the required divestiture within the allotted time, a trustee, appointed by the court or the Commission, will be given 18 months from the date of appointment to divest the remaining Schedule A properties. Until those properties are divested, INI is required to use its best efforts to maintain them as ongoing, viable enterprises. The order further prohibits the company, for a period of ten years, from acquiring any assets or interests of a company that is engaging in the gathering or transportation of natural gas in the Permian basin or the Panhandle whose acquisition price is $15 million or more, and from entering into any agreement or venture for the joint purchasing, gathering, or transportation of natural gas in the Permian basin or the Panhandle without prior Commission approval.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *D. Stuart Meiklejohn, Sullivan & Cromwell,* New York City, for respondent InterNorth, Inc. and *Richard D. Kinder,* Houston, Tex., in-house counsel, for respondent Houston Natural Gas Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, InterNorth, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent Houston Natural Gas Corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. *INI* means InterNorth, Inc., its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which INI is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

b. *HNG* means Houston Natural Gas Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which HNG is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

c. The acquisition means the transaction described, in whole or in part, in Paragraph 14 of this complaint.

II. RESPONDENTS

A. *INI*

2. Respondent INI is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 2223 Dodge Street, Omaha, Nebraska.

3. Respondent INI owns businesses that operate at several levels in the natural gas transportation and distribution industry. In addition, respondent INI engages in the exploration for and production of oil and gas, in the production, transportation, and marketing of liquid fuels and in the production and marketing of petrochemicals.

4. Respondent INI had 1984 sales of $7.5 billion and assets of $6.1 billion as of December 31, 1984.

5. In 1984, respondent INI owned and operated the longest natural gas pipeline system in the United States. INI's pipeline division owned and operated a natural gas pipeline system in the United States consisting of over 23,000 miles of pipeline. INI also owned and operated various other natural gas gathering and transmission facilities. Most of INI's system is interstate pipeline.

6. Respondent INI wholly or partially owns (or owns interests in companies that wholly or partially own) the following natural gas pipelines in the United States: Northern Natural Gas Company Pipeline System; TransTexas Pipeline; Overthrust Pipeline; Tiger Ridge

Pipeline System; Northern Border Pipeline; Trailblazer Pipeline; Cognac Pipeline; NIPCO Louisiana Pipeline; Central Texas Loop Pipeline; Seagull Shoreline System; Matagorda Offshore Pipeline System; and several pipelines used for the local distribution of natural gas that are operated by Peoples Natural Gas Company, a division of INI.

7. At all times relevant herein, respondent INI has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. *HNG*

8. Respondent HNG is a corporation organized and doing business under the laws of the state of Texas with its executive offices at 1200 Travis Street, Houston Texas.

9. Respondent HNG engages in the transmission and sale of natural gas, in the exploration for and production of oil and gas, and in hydrocarbons processing and marketing.

10. Respondent HNG had 1984 sales of $2.0 billion and assets of $3.7 billion, as of December 31, 1984.

11. In late 1984, respondent HNG acquired the Florida Gas Transmission Company and the Transwestern Pipe Line Company, for the first time making respondent HNG an interstate pipeline company. Until these acquisitions, respondent HNG had been exclusively an intrastate pipeline system.

12. In 1984, respondent HNG wholly or partially owned the following intrastate pipelines: Llano, Inc.; Oasis Pipeline Company; Intratex Gas Company; Houston Pipeline Company; Red River Pipeline; HPI Transmission, Inc.; Black Marlin Pipeline Company; Valley Pipelines, Inc.; A-S Pipeline; Texoma Pipeline; and other smaller pipelines.

13. At all times relevant herein, respondent HNG has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

14. On or about May 3, 1985, INI commenced a cash tender offer for up to 100 percent of the outstanding shares of HNG common stock at a price of $70 per share with the intent of effecting a merger of InterNorth Holdings, Inc., a Texas corporation wholly-owned by INI,

into HNG, pursuant to which HNG would become a wholly-owned subsidiary of INI, all as contemplated in that certain Merger Agreement entered into among INI, its subsidiary, and HNG on May 2, 1985. HNG's Board of Directors has approved the tender offer and recommended its acceptance by HNG shareholders. If all the currently outstanding HNG common shares are tendered to INI, the total value of the transaction is about $2.3 billion and, if consummated, it would result in the largest natural gas transportation company in the United States.

IV. TRADE AND COMMERCE

A. *Purchase and Transportation of Natural Gas*

15. One relevant line of commerce in which to evaluate the effects of the acquisition is the purchase of natural gas in producing fields and basins, and the transportation of natural gas from producing fields and basins to consumers.

16. One relevant section of the country is the Permian Basin, composed of "producing districts 8, 8A and 7C" as defined by the Texas Railroad Commission and "New Mexico-East" as defined by the U.S. Department of Energy.

17. Another relevant section of the country is the Panhandle region, composed of "producing district 10" as defined by the Texas Railroad Commission and the counties of Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas and Woodward in Oklahoma.

18. Consumption of natural gas in these two sections of the country is substantially below production in the area, with the result that most production in the area is transported by pipelines to consuming areas on the Texas Gulf Coast and elsewhere in the United States.

19. The business of buying and transporting by pipeline natural gas in and out of these respective sections of the country is concentrated.

20. It is difficult to enter into the business of buying and transporting natural gas by pipeline in these respective sections of the country.

21. INI is the sole owner of the Northern Natural Gas Company Pipeline System that runs from the Permian Basin to the Panhandle and from the Panhandle to consuming areas to the north of the Panhandle, including but not limited to the states of Minnesota and Wisconsin.

22. INI is also an owner of an undivided 50 percent interest in the TransTexas Pipeline that runs from the Permian Basin to New Braunfels, Texas, where the Pipeline connects to pipelines that serve areas on the Texas Gulf Coast.

23. HNG is the sole owner of Llano, Inc., that owns a gathering pipeline system in the Permian Basin.

24. HNG is also the sole owner of the Transwestern Pipe Line Company which owns a pipeline system that runs from both the Permian Basin and the Panhandle to consuming areas to the west of the Permian Basin and the Panhandle, including but not limited to California.

25. HNG is also an owner of 50 percent of the Oasis Pipeline Company which owns a pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

26. HNG is also an owner of 25 percent partnership interest in the Red River Pipeline which owns a pipeline that runs from the Panhandle to the Permian Basin, where the Pipeline connects to pipelines that serve areas located outside of the Permian Basin.

27. Respondents INI and HNG are direct and substantial competitors in the business of purchasing and transporting natural gas in and from producing fields and basins to consuming areas.

B. *Transportation and Sale of Natural Gas*

28. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation and sale of natural gas by pipeline in consuming areas.

29. One relevant section of the country is the Texas Gulf Coast, composed of "producing districts 2, 3 and 4" as defined by the Texas Railroad Commission.

30. The business of selling and transporting by pipeline natural gas in and into the Texas Gulf Coast consuming area is concentrated.

31. It is difficult to enter into the business of selling and transporting natural gas by pipeline in the Texas Gulf Coast consuming area.

32. HNG is the largest competitor in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

33. INI is a competitor of HNG through INI's joint venture known as "Nor-Val", a partnership created in February, 1985, between INI and Valero Transmission Company.

34. INI also competes with HNG by virtue of INI's ownership of 50 percent of the TransTexas Pipeline. TransTexas Pipeline is connected to pipelines serving the Texas Gulf Coast consuming areas at New Braunfels. Some of these pipelines at New Braunfels are owned by Valero Transmission Company. Valero Transmission Company has dedicated capacity to transport natural gas for Nor-Val into the Texas Gulf Coast consuming area.

35. HNG is an owner of 50 percent of the Oasis Pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

36. Respondents INI and HNG are direct and substantial competi-

tors in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

V. EFFECTS

37. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant lines of commerce and relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways among others:

a. actual competition between respondents INI and HNG in the relevant lines of commerce and relevant sections of the country will be eliminated;

b. actual competition between competitors generally in the relevant lines of commerce and relevant sections of the country will be lessened; and

c. concentrations in the relevant lines of commerce and relevant sections of the country will be increased, therefore increasing the likelihood of collusion.

VI. VIOLATION CHARGED

38. The proposed acquisition of the stock and assets of HNG by INI, as set forth in Paragraph 14 herein, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The FTC having initiated an investigation of the proposed acquisition of shares of Houston Natural Gas Corporation ("HNG") by InterNorth, Inc. ("INI"), and INI and HNG ("respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendation of its staff, and having concluded that the consent agreement should be accepted; and

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission issues its complaint, makes the following jurisdictional findings and enters the following order:

1. INI is a corporation organized under the laws of Delaware with its executive office at 2223 Dodge Street, Omaha, Nebraska.

HNG is a corporation organized under the laws of Texas with its executive office at 1200 Travis Street, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

As used in this order the following definitions shall apply:

(a) *Acquisition* means INI's acquisition of shares of the Common Stock of HNG.

(b) *Schedule A Properties* means the assets and businesses listed in Schedule A of this order. *Schedule B Contracts* mean the contracts listed in Schedule B of this order.

(c) *INI* means InterNorth, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by INI and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(d) *HNG* means Houston Natural Gas Corporation, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by HNG, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(e) *Permian Basin* means the counties currently included in Texas Railroad Commission Districts 7C, 8 and 8A and that portion of the state of New Mexico currently defined as *New Mexico—East* by the United States Department of Energy for purposes of reporting on form EIA–23.

(f) *Panhandle* means the counties currently included in Texas Rail-

road Commission District 10 and the following counties in Oklahoma: Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas, Woodward.

(g) *Texas Gulf Coast* means the counties currently included in Texas Railroad Districts 2, 3 and 4.

(h) *Texas Gulf Coast Pipeline Company* means a company, other than INI, that delivered, in the twelve months preceding the date of any agreement of the kind described in paragraph IV(D), a daily average of at least 100 million cubic feet/day of natural gas to the Texas Gulf Coast for consumption therein. For the purposes of this definition, the deliveries of any entity acquired by a company during the preceding twelve months shall be deemed to be deliveries of the company for the entire, preceding, twelve-month period.

II.

It is ordered, That:

(A) Within 12 months of the date this order becomes final, INI shall divest, absolutely and in good faith, the Schedule A Properties.

(B) Within 12 months of the date this order becomes final, INI shall terminate all rights and obligations it may have on the contracts listed on Schedule B.

(C) Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers, and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the Schedule A Properties and the dissolution of the Schedule B Contracts is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) If INI has not divested the Schedule A Properties within the 12-month period, INI shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, INI shall consent to the appointment of a trustee by the Commission pursuant to this order. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by INI to comply with paragraphs II(B) through VI of this order.

(E) If a trustee is appointed by a Court or the Commission pursuant to Paragraph II(D) of this order, INI shall consent to the following

terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to INI's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any Schedule A Properties that have not been divested by INI within the time period for divestiture in Paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court. If, however, at the end of the 18-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of any business that the trustee has the duty to divest, and INI shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. INI shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in Paragraph II(C).

5. The trustee shall serve at the cost and expense of INI on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to INI and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, INI shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

8. The trustee shall report in writing to INI and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

(F) INI shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. INI shall use its best efforts to ensure that the Schedule A Properties continue to be ongoing, viable enterprises engaged in the same business in which the Schedule A Properties are presently employed.

III.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty days thereafter until INI has fully complied with the provisions of Paragraph II of this order, INI shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. INI shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of properties specified in Paragraph II of this order, including the identity of all parties contacted. INI also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, INI shall cease and desist from (A) acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), any interest in or the whole or any substantial part of the stock or share capital of any company that is engaged in the gathering or transportation of natural gas in the Permian Basin or Panhandle (except, however, that, with respect to any particular transaction, INI may, without prior approval of the Commission, (i) acquire any such assets used in the gathering or transportation of natural gas in the Permian Basin or Panhandle so long as the acquisition price of such assets so used is less than $15 million, and (ii) acquire such stock of any such compa-

ny so long as the fair market value—as computed in the manner contemplated by 16 C.F.R. 801.10—of assets held by such company that are used in the gathering or transportation of natural gas in the Permian Basin or Panhandle is less than $15 million), (B) entering into, without prior approval of the Federal Trade Commission, any agreement or venture for the joint purchasing, joint gathering or joint transportation of natural gas in the Permian Basin or the Panhandle with any other party that owns natural gas transportation facilities in the same area, (C) entering into, without prior approval of the Federal Trade Commission, any agreement, pursuant to the April 10, 1985 agreement in principle between El Paso Natural Gas Company and INI, for the purchasing, gathering or transportation of natural gas in the Permian Basin or the Panhandle, (D) entering into, without prior approval of the Federal Trade Commission, any agreement with a Texas Gulf Coast Pipeline Company for the joint marketing of natural gas sold in and to be consumed in the Texas Gulf Coast in connection with which the joint marketing effort contemplates in excess of three unrelated sales transactions, or (E) tendering to The Dow Chemical Company or to Tenngasco, Inc. or receiving from either of these any new gas purchase contracts under the terms of the Gas Supply Agreement dated February 1, 1972, between Intratex Gas Company, The Dow Chemical Company, and Tenngasco, Inc. The prohibitions of this Paragraph IV shall not apply to the (i) construction by INI, without any joint venture participants, of new facilities, or (ii) additions by INI, without any joint venture participants, to existing facilities, or (iii) additions to existing joint venture facilities under existing joint venture arrangements.

One year from the date of service of this order and annually thereafter INI shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to INI and HNG made to its principal office, INI and HNG shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of INI or HNG relating to any matters contained in this order; and

B. Upon five days notice to INI or HNG and without restraint or interference from them, to interview officers or employees of respondents who may have counsel present, regarding such matters.

VI.

It is further ordered, That INI notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

SCHEDULE A

1. Fifty percent (50%) of HNG's stock in Oasis Pipeline Company, a Delaware Corporation.

2. Fifty percent (50%) of Intratex's dedicated capacity under a certain Gas Transportation Agreement dated February 1, 1972 by and between Oasis and Intratex Gas Company, an HNG subsidiary.

3. The partnership interest held by HNG in Red River Pipeline, a Texas general partnership.

4. Llano, Inc.

5. The fifty percent (50%) undivided interest in the TransTexas Pipeline that was acquired pursuant to the Purchase Agreement, dated as of February 28, 1985 by and among Valero Energy Corporation, Valero Transmission Company, INI, Inc., and Northern Texas Intrastate Pipeline Company.

6. Rights and obligations under the following agreements:

a. Ownership Agreement, dated as of February 28, 1985 between Northern Texas Intrastate Pipeline Company and Valero Transmission Company.

b. Pipeline Operating Agreement, dated as of February 28, 1985 between Northern Texas Instrastate Pipeline Company and Valero Transmission Company.

c. Gas Transportation Agreement No. 5201–972, dated as of February 28, 1985 between Valero Transmission Company and Northern Natural Gas Company.

SCHEDULE B

Rights and obligations under the Nor-Val Gas Company Partnership Agreement, dated February 1, 1985, as amended April 1, 1985.

IN THE MATTER OF

AMERICAN SOCIETY OF SANITARY ENGINEERING

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3169. Complaint, Oct. 3, 1985—Decision, Oct. 3, 1985

This consent order requires, among other things, that a Bay Village, Ohio organization ("ASSE"), whose members consist of manufacturers of plumbing products and others associated with the plumbing industry, to cease refusing written requests for issuance of a standard or modification of an existing standard for a product because the product is patented or produced by only one or a limited number of manufacturers. The order also bars the society from failing to take sought action when it has already issued a standard, modification of a standard or a seal of approval covering a competing product and the applicant has demonstrated that its product adequately meets required performance goals. Should ASSE fail to issue the requested standard, modification or seal of approval, it is required to provide the applicant with a statement of the justification and bases for the failure, together with a reasonable opportunity to respond, and to maintain copies of relevant submissions and responses. Additionally, the society is required to incorporate the requirements of Parts I and II of the order into its Bylaws, and publish them in both its *Yearbook* and *Standards Handbook*.

Appearances

For the Commission: *Eugene R. Curry.*

For the respondents: *Sanford Schwartz, Rippner, Schwartz & Carlin,* Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that respondent American Society of Sanitary Engineering, a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act and that this proceeding is in the public interest, hereby issues this complaint.

PARAGRAPH 1. Respondent American Society of Sanitary Engineering ("ASSE") is a non-profit District of Columbia corporation, with its principal place of business in Bay Village, Ohio. ASSE's membership consists of plumbers, plumbing equipment manufacturers, plumbing designers, plumbing contractors, plumbing inspectors, sanitary inspectors, health officers, architects, and engineers.

PAR. 2. ASSE, together with its members, is engaged in the business

of developing, promulgating, promoting, and selling of plumbing product standards and seals of approval.

PAR. 3. Many members of ASSE are engaged in providing plumbing equipment and services for profit. A substantial portion of ASSE's activities relate to standards development and product approval that is of commercial benefit to many of its members. ASSE is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. ASSE, its members and its officers:

(a) develop standards that are distributed and adopted throughout the United States;

(b) send by mail plumbing standards and other publications dealing with plumbing to plumbing professionals located throughout the United States;

(c) collect dues from members located throughout the United States.

ASSE's business is now, and at all times relevant herein has been, in or affecting comerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. Members of ASSE are now and have been in competition among themselves and with others who design, install or manufacture plumbing equipment.

PAR. 6. ASSE standards for plumbing products prescribe implicit and explicit performance and design requirements for various types of plumbing products, and set forth the test methods to be used to measure performance against those requirements.

PAR. 7. Manufacturers of plumbing products participate in the development of ASSE standards by:

(a) providing technical expertise upon which standards are based;

(b) participating in drafting proposed standards;

(c) underwriting the costs of standards development;

(d) participating in various ASSE committees which review proposed standards and applications for standards; and

(e) chairing ASSE committees, serving on the ASSE Board of Directors, and holding other key administrative and policy positions within ASSE.

PAR. 8. ASSE promotes reliance on its standards and seal of approval program by building code and regulatory officials as a substitute for the evaluation of plumbing products by those officials and as a basis for approval of these products for sale in their jurisdictions. ASSE represents that its standards and seal of approval program provides an objective, independent, expert analysis of the acceptability of plumbing products covered by ASSE standards. In addition,

ASSE represents that it is the leader among standards developers in developing new standards to incorporate the state of the art in technology and innovative designs.

PAR. 9. As a result, and because most state and local building code and regulatory officials do not have the technical or financial resources to evaluate the performance characteristics of plumbing products, there is extensive reliance upon ASSE standards and seals of approval. Thirty states and numerous local jurisdictions have adopted ASSE standards into their building codes. In those jurisdictions, evidence of compliance with ASSE standards is the sole means of obtaining approval for sale. In addition, ASSE standards and seals of approval are relied upon by model code groups (*i.e.*, organizations which develop model building codes for adoption by state and local authorities), federal agencies, and foreign governments as a means of determining the acceptability of plumbing products.

PAR. 10. Because of extensive reliance upon the ASSE standards program, evidence of compliance with an ASSE standard is essential for manufacturers of plumbing products to do business in many markets. Evidence of compliance with ASSE standards confers important competitive benefits upon manufacturers by easing entry into markets, even where compliance to an ASSE standard is not required by law.

PAR. 11. ASSE promulgates a group of standards for backflow prevention products. Backflow is the unintended reversal of the flow of possibly contaminated water back into the potable water distribution system. ASSE represents that it has the most complete group of backflow prevention standards in the world.

PAR. 12. In 1964, ASSE, with the support of eighteen manufacturers of plumbing devices, developed a standard, ASSE 1002, for ballcock valves which control the supply of water into toilet flush tanks. Valves performing this function are referred to as toilet tank fill valves. A ballcock valve is opened or closed by means of a float or similar device. ASSE 1002 specifies that ballcock valves must be equipped with a vacuum breaker or air gap to prevent backflow. ASSE 1002 is the only standard developed by ASSE for toilet tank fill valves.

PAR. 13. As a result of ASSE's representations as to its expertise in plumbing generally, and in all types of backflow prevention devices in particular, and its representations as to its leadership in incorporating innovative technology into its standards program, many building code and regulatory officials and others are led to believe that ASSE-approved ballcock valves are the only appropriate, acceptable, and adequate means of preventing backflow from toilet tanks into potable water supply systems. Many building code and regulato-

ry officials and others rely on ASSE 1002 as the only standard for evaluating the acceptability of toilet tank fill valves.

PAR. 14. J.H. Industries, Inc., (J.H.) a California corporation with its principal place of business at 980 Rancheros Drive, San Marcos, California, manufactures an innovative toilet tank fill valve, under the brand name Fillpro. The Fillpro valve differs from ballcock valves in that it uses a pressure sensitive diaphragm to control the water level and a double check valve to prevent backflow rather than an air gap or vacuum breaker. J.H., in marketing the Fillpro valve, represents that its design offers performance advantages over ballcock valves. These include: that use of the Fillpro valve by toilet manufacturers would permit greater flexibility in design of toilets resulting in lower material costs; that the Fillpro valve is safer than ballcock valves because it is less likely than ballcock valves to be incorrectly installed so as to allow backflow; that the Fillpro valve has fewer moving parts than ballcock valves and therefore needs replacement less frequently; that the Fillpro valve operates more quietly than ballcock valves; and that the Fillpro valves can be adjusted to regulate the water level in the flush tank to conserve water.

PAR. 15. Because ASSE 1002 specifies ballcocks equipped with vacuum breakers or air gaps as the only acceptable design for a toilet tank fill valve, the Fillpro valve is, by ASSE's definition, nonstandard. Without an ASSE standard for evaluating the Fillpro valve, J.H. has no means to establish to building code and regulatory officials and others who rely on ASSE standards that the Fillpro valve adequately prevents backflow.

PAR. 16. J.H. has developed credible evidence to demonstrate that the Fillpro valve protects against backflow at least as well as ballcock valves. On the basis of this evidence, several model code groups, local jurisdictions, and foreign countries have approved the Fillpro valve for sale. This evidence includes:

(a) testing by Truesdail Laboratories, Inc., an independent laboratory, against a version of ASSE 1002 modified by J.H. to reflect the design differences between the Fillpro valve and ballcock valves that resulted in a finding that the Fillpro valve adequately prevented backflow;

(b) testing by the National Sanitation Foundation, which is accredited by ASSE for testing products according to ASSE standards, against a new standard, developed by J.H. with the assistance of an independent expert, based on performance requirements of two ASSE standards that determined that the Fillpro valve provided adequate protection against backflow; and

(c) the expert opinion of ASSE's Standards Coordinator who assist-

ed in drafting the standard described in (b), above, and who stated that, after reviewing the test results based upon that standard "the Fillpro valve has demonstrated its backflow preventing capabilities."

PAR. 17. ASSE has refused to modify or develop a standard for evaluating the Fillpro valve. As a result, J.H. has been hindered or prevented from marketing the Fillpro valve in jurisdictions which rely on ASSE standards. These restrictions limit J.H.'s sales in the market for replacement valves installed by plumbers and consumers and in the market for valves installed as original equipment by manufacturers of toilets.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated by reference herein as if fully set forth verbatim.

PAR. 18. In 1975, J.H. requested that ASSE modify ASSE 1002 to permit the use of a double check valve as a means of preventing backflow in toilet tank fill valves. J.H. supported its request with the evidence described in Paragraph 16(a), above. ASSE rejected the revision proposed by J.H. on the ground that J.H.'s proposal "was contrary to established practices for the prevention of backflow" and that ASSE-approved ballcocks were the only acceptable means for preventing backflow. ASSE did not address or identify any inadequacies in the evidence offered in support of the proposed revision, nor did ASSE provide any evidentiary support for exclusive reliance on the existing design (*i.e.*, ballcocks with air gaps or vacuum breakers) to prevent backflow.

PAR. 19. In adopting the policies and engaging in the acts and practices described in Paragraph 18, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 20. ASSE had no reasonable basis or justification for rejecting the innovative design and relying on ballcocks with vacuum breakers or air gaps as the only acceptable design for toilet tank fill valves. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated herein as if set forth verbatim.

PAR. 21. In 1978, J.H. developed a standard for evaluating its product by drawing from applicable portions of existing ASSE standards. J.H. has requested that ASSE adopt this standard on several occasions and supported that request with the evidence described in

Paragraph 16. ASSE has refused to adopt the proposed standard or even to consider the standard and supporting evidence. ASSE justified its refusal on the ground that ASSE has a policy of refusing to develop a standard for a product which is patented or manufactured by only one manufacturer.

PAR. 22. In adopting the policies and engaging in the acts and practices described in Paragraph 21, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 23. ASSE has no reasonable basis or justification for its refusal to develop standards for products manufactured by only one manufacturer. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

PAR. 24. The purposes or effects of the acts and practices described in Paragraphs 17 through 23 are and have been to unreasonably restrain trade and hinder competition in the manufacture and sale of plumbing devices in numerous geographic markets, and to unreasonably deprive consumers of the benefits of competition in the following ways, among others:

(a) an innovative product has been excluded from various geographic markets of the United States;

(b) building code and regulatory officials and buyers of toilet tank fill valves have been misled to believe that the product will not perform adequately to prevent backflow when compared to ballcock valves; and

(c) building and regulatory code officials and buyers of toilet tank fill valves have been deprived of information about the performance of the product.

PAR. 25. The policies, acts, and practices described in Paragraphs 17 through 23 are in or affect commerce as commerce is defined in the Federal Trade Commission Act.

PAR. 26. The policies, acts and practices and combination described above were and are to the prejudice or injury of the public, and constituted and now constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of the Rules and having revised the consent order in response to these comments to clarify the intended operation of the order, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at P.O. Box 9712, in the Town of Bay Village, in the State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

ASSE means the American Society of Sanitary Engineering, its successors and assigns.

Competent and reliable testing criteria means a method or methods of testing or evaluation to measure whether the performance of a given product satisfies the implicit or explicit performance goals that underlie a standard. A rebuttable presumption of competence and reliability shall exist for testing criteria that are developed by a testing laboratory or expert that has been relied upon by ASSE to judge the acceptability of other products covered by standards.

Competing products means products sold or available in the market that can be used for substantially the same end use as the applicant's product.

Reasonable standard-setting criteria means criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product. It shall not be reasonable for ASSE to require that the performance level for an applicant's product exceed the performance level required of competing products.

I.

It is ordered, That respondent American Society of Sanitary Engineering, its successors and assigns, and respondent's officers, agents, representatives, employees, and committees, directly or through any corporate or other device, in connection with any standard or seal of approval in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (hereinafter standard or seal of approval), do forthwith cease and desist, from directly or indirectly failing to issue a new standard, a modification of an existing standard, or a seal of approval for any reason, including that the product to be covered by the requested standard, modification or seal is patented or produced by only one manufacturer or a limited number of manufacturers, whenever

(1) ASSE has received a written application requesting such action,

(2) ASSE has already issued a standard, modification of a standard or a seal of approval covering any competing product(s),

(3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing product(s) (*e.g.,* the applicant has proposed competent and reliable testing criteria for the product and, under the proposed criteria, has demonstrated that the product meets the existing standard's performance goals), and

(4) ASSE does not at that time possess or rely upon a justification for failing to issue the requested standard, modification, or seal of approval that would satisfy reasonable standard-setting criteria.

II.

It is further ordered, That whenever (1) ASSE receives for any product a written application requesting that ASSE issue a new stan-

dard, a modification of an existing standard, or a seal of approval, (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing products, and (4) ASSE fails to issue the requested standard, modification, or seal of approval, ASSE shall:

A. provide to the applicant a written statement of the justification and bases for the failure, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied;

B. provide to the applicant a reasonable opportunity to respond;

C. if the applicant responds in writing, provide the applicant a written statement of the justifications and bases for the final decision which addresses all the issues raised by the applicant's response, including the identification of the standard-setting criteria and tests or other evidence or information upon which ASSE relied; and

D. maintain copies of the applicant's submissions, of all responses made to the applicant, of the applicant's responses thereto, if any, and of the justifications and bases for the final decisions.

III.

It is further ordered, That ASSE shall incorporate the requirements of Parts I and II of this order in its Bylaws and publish the requirements of Parts I and II of this order in the *ASSE Standards Handbook* and the *ASSE Yearbook.*

IV.

It is further ordered, That ASSE shall:

A. maintain in a separate file for a period of at least ten (10) years after the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying every application for issuance or modification of an ASSE standard or issuance of a seal of approval and all documents that discuss, refer, or relate thereto;

B. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment, a sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries; and

C. within sixty (60) days from the date of service of this order submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ATLAS SUPPLY CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 5794. Order, July 19, 1951—Modifying Order, Oct. 8, 1985

The Federal Trade Commission has denied a request from Atlas Supply Co. and its parent companies to set aside a 1951 cease and desist order (48 F.T.C. 53), but has modified the order by deleting one provision that restricted the joint purchasing activities of respondents.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 19, 1951

On June 7, 1985, Atlas Supply Company ("Atlas") and its shareholders, Amoco Oil Holding Company, The Standard Oil Company (Ohio), Chevron U.S.A. Inc., and Exxon Corporation filed a "Request To Reopen And Set Aside Cease And Desist Order" ("Request"), pursuant to Section 5(b) of The Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and terminate the cease and desist order issued on July 19, 1951 ("the order").

The order contains five substantive ordering paragraphs. The first two ordering paragraphs require Atlas and its shareholders to cease and desist from receiving or transmitting commissions, brokerage, or other compensation in connection with their purchases of automobile tires, tubes, batteries or other automobile parts or accessories ("TBA") in violation of Section 2(c) of the Robinson-Patman Act. The third and fourth ordering paragraphs require respondents to cease and desist from knowingly inducing or accepting discriminatory prices in connection with their TBA purchases in violation of Section 2(f) of the Robinson-Patman Act unless a cost saving or good faith meeting of competition justification exists. The fifth ordering paragraph, which was issued pursuant to Section 5 of the Federal Trade Commission Act, prohibits respondents from using their combined purchasing power in connection with their TBA purchases to obtain any "price, discount, rebate, allowance or other treatment from a seller which is preferential to that allowed, afforded or made available by such seller" to competitors of any of the respondents. After reviewing the Request, the Commission has concluded that respondents have not made a satisfactory showing that changed circumstances or public interest considerations require that the Robinson-Patman Act provisions of the order be terminated. The Commission has determined,

however, that it is in the public interest to modify the order to set aside the provision that prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases.

Respondents have not shown how they are harmed by their obligation to comply with the Section 2(c) and 2(f) provisions of the order which they concede "do little more than repeat the Robinson-Patman Act . . ." Request, p.4. Respondents do not assert that the conduct in which they engaged prior to 1951 is no longer violative of the Robinson-Patman Act nor do they make any showing that the R-P provisions of the order inhibit lawful activity in which they wish to engage. Because the Section 2(c) and 2(f) provisions of the order merely require compliance with the law, they do not put respondents at a disadvantage with respect to their competitors who are also obliged to obey the law, nor do they impose any restrictions on respondents' lawful activities. Respondents' primary argument is that in view of the passage of thirty-four years since the order was issued there is no reason to suppose that the resumption of joint purchasing by Atlas and the other respondents would be accompanied by violations of the Robinson-Patman Act. However, the deterrent effect of law enforcement actions by the Commission could be adversely affected if the Commission were to sunset conduct orders that do no more than require compliance with the law. And in recent cases the Commission has declined to terminate conduct orders solely because of their age. *See, e.g., William H. Rorer, Inc.*, Docket No. 8599, Modifying Order issued September 14, 1984 [104 F.T.C. 544] (Commission declined to set aside a 17-year old order issued under Section 2(a) of the Robinson-Patman Act, although it did terminate fencing in provisions); *National Dairy Products Corp.*, 100 F.T.C. 431 (1982) (Commission declined either to rescind or terminate in five years a perpetual order issued under Section 2(a) of the Robinson-Patman Act); *ABC Vending Corp.*, Docket No. 7652 (Letter from Secretary of the Commission to Arthur H. Kahn, Esquire, dated January 28, 1982. Commission declined to set aside perpetual order provision based on Section 2(f) of the Robinson-Patman Act that "merely restates the law that must be adhered to by the respondent . . . and consequently does not hinder the respondent's ability to compete.").

On the other hand, the Commission has concluded that the public interest warrants modifying the order to set aside its fifth ordering paragraph which prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases. As the Request observes, this provision does not define "preferential" nor, in contrast to the Robinson-Patman Act provisions of the order, does it

include any specific recognition of the availability of a cost justification or meeting competition defense. Request, p.4. It thus forbids conduct that would be lawful under the Robinson-Patman Act. To the extent that this provision was included in the order out of concern that the market growth which had been experienced by the Atlas brands from 1930 to 1949 threatened a recurrence, in TBA at least, of the monopoly power of the original Standard Oil Company, Request, p.5, respondents have demonstrated that in the thirty-four years since the order was issued there has been no such recurrence of monopoly power with respect to TBA and no tendency in that direction. In contrast to the situation at the time the order issued when it was stipulated that Atlas products approximated ten percent of the total replacement sales of TBA products in the United States, Atlas brands today represent TBA market shares ranging from a high of 3.26 percent (oil filters) to a low of 0.176 percent (remanufactured starters and alternators). Nevertheless, according to the Request, the breadth of the possible reach of the fifth ordering paragraph has caused Atlas and its shareholders to forego any consideration of joint purchasing regardless of efficiencies or competitive considerations. Request, p.5. The fifth ordering paragraph initially served a legitimate purpose in that it assured the termination of the violations of the Robinson-Patman Act that had been associated with respondents' joint purchasing activities. It appears, however, that this provision of the order has long since accomplished its remedial purpose and is now serving to inhibit respondents from engaging in lawful competitive behavior. Despite the passage of thirty-four years since the order issued, respondents' competitors in the TBA industry have not been placed under any comparable restraint. Moreover, in many instances joint buying groups may facilitate pro-competitive economies and efficiencies without significant countervailing anticompetitive effects. Request, pp. 10–12.

Accordingly, *it is ordered*, that this matter be, and it hereby is, reopened, and that the fifth ordering paragraph of the Commission's order issued on July 19, 1951, shall be of no further force and effect as of the effective date of this modifying order.

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

ORDER LIFTING *IN CAMERA* TREATMENT AND PLACING EXHIBITS ON THE PUBLIC RECORD

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for certain evidentiary exhibits in this matter, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status.

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited,* D. 8955, [86 F.T.C. 1241 (1975), *dismissed,* 95 F.T.C. 805 (1980)] as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual

and exceptional circumstances. 16 C.F.R. 3.45(b). Those circumstances occur only on a showing that placing the documents on the public record would result in a clearly defined, serious injury to the corporation submitting the documents. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455 (1977).

In cases such as these, where the information is old, an even greater burden is placed on the submitter. Even where a clearly defined, serious injury can be demonstrated when close in time, its basis is normally removed by the passage of years. *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 334 (1967). Unless the documents can be used to make such a convincing showing of significant insight into current operations that serious competitive injury would result, continued *in camera* treatment is not justified. *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has examined the business records at issue of Airco and BOC to determine whether they presently deserve the *in camera* protection that has been accorded to them. Information contained in these records is at least 12 years old. Without addressing whether publication might have caused a clearly defined, serious injury had the records been disclosed in 1974, the Commission has determined that any sensitivity that may have existed has been removed by passage of twelve years. Specifically, the Commission recognizes that in some instances old data may be used to extrapolate information that would provide significant insight into current business operations. In this instance, however, the Commission believes that the passage of twelve years makes the construction of a current, accurate model impossible. Thus, we find that disclosure of the business records would not result in the clearly defined, serious injury necessary to justify continued *in camera* protection.

Similarly, the Commission has concluded that public disclosure of the twelve year old comments evaluating the performance of Airco's officers and directors would create nothing more than a slight embarrassment to the individuals involved, not a clearly defined, serious injury. The Commission has previously held that "the mere embarrassment of the movant should not foreclose public disclosure." *Hood, supra* at 1188–89. For these reasons,

It is ordered, That the *in camera* status of exhibits CX 78, 95, 161, 162, 163, 232, 254, 255, and 301 be lifted.

It is further ordered, That the Secretary notify the companies by mail of our determination to lift the *in camera* status of the exhibits referenced above; and that the Secretary place the exhibits in this matter on the public record no sooner than ten (10) calendar days after receipt of this notification by the parties.

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

NOTICE OF INTENT TO RELEASE CONFIDENTIAL INFORMATION

This is to advise BOC International, Limited, BOC Financial Corporation, BOC Holdings Limited, British Oxygen Investments, Limited and Airco, Incorporated ("the companies") that, pursuant to the Commission's order in Docket 8955, the Commission intends to place on the public record certain exhibits introduced into evidence in Docket No. 8955 in an *in camera* status. [86 F.T.C. 1241 (1975)]

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for these exhibits, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status. [95 F.T.C. 805 (1980)]

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited,* D. 8955, as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual and exceptional circumstances. 16 C.F.R. 3.45(b). Those circumstances occur only on a showing that placing the documents on the public record would result in a clearly defined, serious injury to the corporation submitting the documents. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455 (1977).

In cases such as these, where the information is old, an even greater burden is placed on the submitter. Even where a clearly defined, serious injury can be demonstrated when close in time, its basis is normally removed by the passage of years. *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 334 (1967). Unless the documents can be used to make such a convincing showing of significant insight into current operations that serious competitive injury would result, continued *in camera* treatment is not justified. *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has examined the business records at issue of Airco and BOC to determine whether they presently deserve the *in camera* protection that has been accorded to them. Information contained in these records is at least 12 years old. Although it appears that publication might have caused a clearly defined, serious injury had the records been disclosed in 1974, any sensitivity that had existed has been removed by passage of twelve years. We have studied the records to determine whether the sensitivity of the information may be preserved by virtue of the possibility that the data may be used to make a convincing showing of insight into operations of BOC's current businesses. In this instance, however, the passage of twelve years makes the construction of a current, accurate model impossible. Thus, we cannot find that the business records demonstrate the clearly defined, serious injury necessary for continued *in camera* status.

We have also examined documents containing the evaluations of Airco's officers and directors to determine whether they warrant continued *in camera* status. We have concluded as a result of our examination that public disclosure of the twelve year old comments would create nothing more than a slight embarrassment to the individuals involved, not a clearly defined, serious injury to BOC. Accordingly, in cases such as this, we have held that "the mere embarrassment of the movant should not foreclose public disclosure." *Hood, supra* at 1188–89.

For the reasons expressed above, the Commission will lift the present *in camera* status of the exhibits CX–78, CX–95, CX–161, CX–162, CX–163, CX–232, CX–254, CX–255 and CX–301 entered into evi-

dence in the course of adjudication in D. 8955. The documents will be placed on the public record no sooner than then (10) calendar days following service of this notice on the companies.

IN THE MATTER OF

MICHIGAN OPTOMETRIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3170. Complaint, Oct. 10, 1985—Decision, Oct. 10, 1985

This consent order requires the Michigan Optometric Association, among other things, to cease prohibiting, restricting or restraining any optometrist from: (1) entering into or affiliating with a corporate practice; (2) practicing in any location; or (3) disseminating truthful, non-deceptive information. Additionally, the Association is required to repeal those Bylaws and Standards of Conduct that conflict with the order. Further, the Association is required to send notice of the order to: (1) all optometrists who resigned or were terminated because they engaged in a corporate practice or practiced in a retail location; (2) all members of the Association; (3) all other optometrists currently licensed in the State of Michigan; and (4) everyone to whom the Association sends an application for membership for the next five years.

Appearances

For the Commission: *Robert P. Weaver.*

For the respondent: *William R. Ralls,* Lansing, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Michigan Optometric Association, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Michigan Optometric Association is a corporation formed pursuant to the laws of the State of Michigan, with its mailing address at 530 West Ionia Street, Suite A, Lansing, Michigan.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of optometrists who practice in Michigan as well as the profession of optometry in Michigan. Respondent has approximately six hundred thirty (630) members, constituting approximately two-thirds of the practicing optometrists in Michigan. A significant portion of respondent's activities furthers its

members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

PAR. 3. Respondent's members are engaged in the business of providing optometric care or services for a fee. Some are also engaged in the sale of optical goods and devices. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves.

PAR. 4. In the conduct of their business, respondent's members receive substantial sums of money, which monies flow across state lines, from the federal government and from private insurers for rendering optometric services; they prescribe and sell optical goods and devices that are shipped in interstate commerce; they receive and treat patients from other states; and they use supplies and equipment that are shipped across state lines. The acts or practices described below are in interstate commerce; or affect the interstate activities of respondent's members, third parties who pay for optometric services, other third parties, and some patients of respondent's members; and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

PAR. 5. The practice of optometry is defined by Michigan law to include: the examination of the human eye to detect abnormal conditions that may be corrected by lenses or other mechanical devices; the determination of visual ability or muscular equilibrium of the human eye; the adjustment of lenses used to correct an abnormal condition of the human eye; the examination and fitting of the human eye for contact lenses; and the use of certain pharmaceutical agents in the examination of the human eye. Michigan law also provides that a layperson may, pursuant to a written prescription of a licensed optometrist or physician, sell eyeglasses as an article of merchandise.

PAR. 6. In Michigan, most optometric services have traditionally been provided by optometrists practicing as sole proprietorships, as partners in partnerships, as shareholders of professional corporations, or as employees of proprietorships, partnerships, professional corporations, hospital clinics, or health maintenance organizations.

PAR. 7. For purposes of this complaint, *corporate practice* shall mean practice by an optometrist as an owner of, an employee of, or an affiliate of a business corporation that is not a hospital clinic, health maintenance organization, or professional corporation. Some optometric services in Michigan are provided by optometrists engaging in corporate practices.

PAR. 8. For various reasons, including their scale of operation, corporate practices are often able to deliver optometric services and to provide quality optical goods and devices at prices lower than those

generally charged for comparable services or items by traditional optometrists or independent opticians.

PAR. 9. For purposes of this complaint, *retail location* shall mean a location of a practice in a department, division, or section of a retail, department, or discount store. Some optometric services in Michigan are provided by optometrists practicing in retail locations. Optometrists can increase consumer access to optometric care and can achieve operating efficiencies through the use of retail locations.

PAR. 10. In selecting an optometrist and/or provider of optical goods, consumers consider factors such as quality of service, price and other terms of sale, reputation, experience, availability of different types or styles of optical goods, and location and other convenience factors. Advertising in a variety of media, including billboards, and at store locations, enables optometrists to inform consumers about these factors. Such truthful, non-deceptive advertising benefits consumers by increasing the information available to them and promoting competition among optometrists.

PAR. 11. Respondent has restrained competition in the delivery of optometric services and the sale of optical goods and devices in Michigan by acting as a combination of at least some of its members, or by combining and conspiring with at least some of its members, to restrict the use of corporate practices and retail locations, and to restrict dissemination by optometrists of truthful, non-deceptive information to consumers. In particular, respondent has combined or conspired with at least some of its members to:

(A) Prohibit or restrict optometrists from providing or offering to provide optometric services through a corporate practice, or from selling or offering to sell optical goods and devices to the public through a corporate practice;

(B) Prohibit or restrict optometrists from providing or offering to provide optometric services in a retail location, or from selling or offering to sell optical goods and devices to the public in a retail location; and

(C) Prohibit or restrict optometrists from disseminating information to consumers through truthful, non-deceptive advertising.

PAR. 12. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

(A) Requesting the resignation and terminating the membership of optometrists who provide services or sell optical goods and devices through a corporate practice;

(B) Adopting and maintaining a bylaw restricting membership to

those optometrists who provide services or sell optical goods and devices other than through a corporate practice;

(C) Requesting the resignation and terminating the membership of optometrists who provide services or sell optical goods and devices in a retail location;

(D) Adopting and maintaining a bylaw restricting membership to those optometrists who provide services or sell optical goods and devices other than in a retail location; and

(E) Adopting and maintaining standards of conduct that prohibit optometrists from:

(1) displaying their names in the lobby or public hall of a building in any manner that stands out from a listing of other occupants of the building;

(2) using professional cards, billboards, letterhead, or stationery containing any information other than certain limited items;

(3) using large signs or any representations of eyes, eyeglasses, or the human head; and

(4) using lettering that is larger than a specified size on windows or doors.

PAR. 13. The purposes or effects of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Eleven and Twelve have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

(A) Competition in the delivery of optometric services and the sale of optical goods and devices on the basis of price, service, and quality has been frustrated and restrained;

(B) Consumers have been deprived of the benefits of a variety of truthful, non-deceptive information about optometric services and optical goods and devices; and

(C) Consumers have been deprived of the potential cost savings, convenience, and efficiency benefits of corporate practices and retail locations in their purchases of optometric services and optical goods and devices.

PAR. 14. The combination or conspiracy and acts or practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. The combination or conspiracy, the acts or practices, and the effects thereof are continuing and will continue unless the Commission enters appropriate relief against respondent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Michigan Optometric Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its mailing address at 530 West Ionia Street, Suite A, Lansing, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

For purposes of this order, the following definitions shall apply:

(A) *Respondent* means the Michigan Optometric Association, its directors, trustees, councils, committees, officers, representatives, delegates, agents, employees, successors, and assigns.

(B) *Optometrist* means any individual duly licensed to engage in the practice of optometry in the State of Michigan.

(C) *Corporate practice* means practice by an optometrist as an owner of, an employee of, or an affiliate of a business corporation that is not a hospital clinic, health maintenance organization, or professional corporation.

(D) *Retail location* means the location of a practice in a department, division, or section of a retail, department, or discount store.

II

It is ordered, That respondent, directly, indirectly, or through any corporate or other device, in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Prohibiting, restricting, or restraining any optometrist from entering into or affiliating with a corporate practice, through any means, including, but not limited to:

(1) Declaring it to be an unethical or otherwise objectionable practice in violation of the respondent's constitution, bylaws, standards of conduct, code of ethics, or policies, for any optometrist to enter into or affiliate with a corporate practice;

(2) Expelling or suspending, or threatening to expel or suspend, any optometrist from membership, or refusing to grant membership to any optometrist, or taking any other disciplinary action against any optometrist, for entering into or affiliating with a corporate practice; and

(3) Adopting or maintaining any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from entering into or affiliating with a corporate practice;

(B) Prohibiting, restricting, or restraining any optometrist from practicing in any location, through any means, including, but not limited to:

(1) Declaring it to be an unethical or otherwise objectionable practice in violation of the Respondent's constitution, bylaws, standards of conduct, code of ethics, or policies, for any optometrist to practice in a retail location;

(2) Expelling or suspending, or threatening to expel or suspend, any optometrist from membership, or refusing to grant membership to any optometrist, or taking any other disciplinary action against any optometrist, for practicing in a retail location; and

(3) Adopting or maintaining any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from practicing in a retail location; and

(C) Restricting, regulating, prohibiting, impeding, declaring unethical, interfering with, or advising against the advertising, publication, or dissemination of information about optometric services or optical goods and devices that are offered for sale or made available by an optometrist or by any organization with which an optometrist is affiliated, through any means, including, but not limited to, adopting, maintaining, or enforcing any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from:

(1) Displaying an optometrist's name in the lobby or public hall of a building in any manner that stands out from a listing of other occupants of the building;

(2) Using professional cards, billboards, letterhead, or stationery containing any information other than certain limited items;

(3) Using large signs, or depictions in advertising that contain representations of eyes, eyeglasses, or the human head; and

(4) Using lettering that is larger than a specified size on windows or doors, or displaying ophthalmic materials and certificates visible from other than just within the opthalmic office.

Provided, That nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III

It is further ordered, That respondent shall:

(A) No later than ninety (90) days after the date this order becomes final, remove from its constitution, bylaws, standards of conduct, codes of ethics, and any other policy statements of respondent, any provision, rule, standard, interpretation, or policy statement that is inconsistent with Part II of this order, by amendment, revision, or in such other manner as to eliminate the inconsistency, including, but not limited to, removal of respondent's Bylaws, Article I, Sections 1(A)(b) and (c), and respondent's Standards of Conduct, Article III, Sections (B)(c), (e), (f), and (g); and

(B) Within one hundred twenty (120) days after the date this order becomes final, publish in the *Michigan Optometrist* or, if that publication is no longer in existence one hundred twenty (120) days after the

date this order becomes final, in any successor publication, notice of the removal or amendment of any such provision, rule, standard, interpretation, or policy statement as described above.

IV

It is further ordered, That respondent shall:

(A) Within sixty (60) days after the date this order becomes final, send by first-class mail the letter attached hereto as Attachment A, an application for membership, and a copy of this order and the attached complaint to each optometrist whose membership was terminated or who resigned, and for which the basis of such termination or resignation was his or her corporate practice status or practice in a retail location [*e.g.,* a violation of respondent's Bylaws, Article I, Section 1(A)(b) or (c)]; offer to reinstate any such optometrist's membership in respondent; and if any optometrist so desires, reinstate such membership within thirty (30) days after the application is returned, *provided,* the optometrist meets respondent's current requirements for membership as they are generally applied to all existing members and, *provided,* these requirements are fair and reasonable;

(B) Within sixty (60) days after the date this order becomes final, send by first-class mail the letter attached hereto as Attachment B, an application for membership, and a copy of this order and the attached complaint to every optometrist who is licensed to practice in the State of Michigan, but who has not been notified pursuant to Part IV(A) of this order and is not a member of respondent;

(C) Within sixty (60) days after the date this order becomes final, and ten (10) days prior to the publication of this order and the attached complaint pursuant to Part IV(D) of this order:

(1) send by third-class mail the letter attached hereto as Attachment C to every optometrist who is a member of respondent, or

(2) at the respondent's option, include the letter attached hereto as Attachment C as a separate two (2) page insert in the front of any third-class mailing sent in the respondent's normal course of business to every optometrist who is a member of respondent, *provided, however,* the total mailing to each optometrist does not exceed ten (10) pages;

(D) Within sixty (60) days after the date this order becomes final, publish a copy of this order and the attached complaint in the *Michigan Optometrist* or, if that publication is no longer in existence sixty (60) days after the date this order becomes final, in any successor publication; and

(E) For a period of five (5) years after the date this order becomes final, include the notice attached hereto as Attachment D in or with

every application for membership sent, disseminated, or distributed by respondent to any person. The notice shall be printed as a separate paragraph in type at least as large as the type face of the major portion of the text of the application, and in such manner that it is clear and prominent.

V

It is further ordered, That respondent shall:

(A) Within one hundred twenty (120) days after the date this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, including, but not limited to, a copy of each constitution, bylaw, standard of conduct, code of ethics, or policy statement that was revised or amended to assure compliance with this order;

(B) Annually, for a period of two (2) years after the date this order becomes final, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with any activity covered by Parts II, III, and IV of this order, including, but not limited to, the rendering of any advice or interpretation with respect to any corporate practice, retail location, or advertising involving any optometrist; and

(C) For a period of five (5) years after the date this order becomes final, maintain, and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Parts II, III, and IV of this order, including, but not limited to: the rendering of any advice or interpretation with respect to any corporate practice, retail location, or advertising involving any optometrist; rulemaking and enforcement proceedings; and written communications, and any summaries of oral communications, to or from the respondent.

VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, association, or other entity, or any other change in the respondent that may affect compliance obligations arising out of this order.

ATTACHMENT A

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, non-deceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Therefore, even though you are affiliated with a corporate practice or practice in a retail location, you now qualify for membership in the Michigan Optometric Association, and you have a right to reinstatement of your membership provided that you still meet current membership requirements of the Association. If you wish to reinstate your membership, please do the following:

1. Fill out the enclosed application form. Please note, however, that you do not have to obtain the signatures of two current members of the Association for reinstatement.
2. If you have unpaid dues from your former period of membership, a statement is enclosed with this letter. If you have questions regarding the amount due, please contact us. Payment for any outstanding dues should be enclosed with the application.
3. You must also enclose payment for current applicable dues.
4. Return the application and payment to the Association.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT B

Dear Dr._____:

This letter is to inform you of a Consent Order (copy enclosed) that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement

purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, non-deceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Consequently, membership in the Michigan Optometric Association is now open to any optometrist licensed to practice in Michigan, regardless of the structure or location of his or her practice, and you are welcome to apply. We have enclosed a membership application for your convenience.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT C

Dear Dr._____:

This letter is to inform you of a Consent Order that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, nondeceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Consequently, membership in the Michigan Optometric Association is now open to any optometrist licensed in the State of Michigan, regardless of the structure or location of his or her practice. For your information, a complete copy of the Federal Trade Commission's Complaint and the Consent Order will appear in the [Month, 19__] issue of the *Michigan Optometrist.*

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT D

The Michigan Optometric Association welcomes all optometrists to apply for membership regardless of the type or location of their practice. The Association treats all optometrists equally, in accordance with an agreement it entered into with the Federal Trade Commission on [insert date of issuance of the Consent Order]. If you have any questions about this policy, feel free to call the Association at (517) 482–0616 or the Federal Trade Commission at (216) 522–4207.

IN THE MATTER OF

WRIGHT-PATT CREDIT UNION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3171. Complaint, Oct. 21, 1985—Decision, Oct. 21, 1985

This consent order requires a Fairborn, Ohio, credit union, among other things, to cease failing to tell consumers, when applications for credit are denied because of information contained in credit reports (including non-derogatory information), that the adverse action had been taken on the basis of such information; and provide the rejected credit applicants with the names and addresses of the credit bureaus that had submitted the reports. The order further bars the organization from failing to identify applications submitted between Sept. 1, 1983 and the date of issuance of the order, for which adverse action had been taken on the basis of information obtained from a consumer reporting agency, and to send to those rejected applicants who had not been given the legally-required disclosures, a copy of the notification letter attached to the order as Appendix A.

Appearances

For the Commission: *Eileen M. Harrington.*

For the respondents: *Robert G. Palmer, Palmer & Perdue,* Columbus, Ohio.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Wright-Patt Credit Union, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the accompanying order the following definitions are applicable:

A. The terms *consumer, consumer report, consumer reporting agency* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating that the consumer reporting agency has no credit history information in its files under the name and other identifiers supplied by respondent.

C. The term *non-derogatory information* shall be defined as information in a consumer report, furnished to respondent by a consumer reporting agency, consisting of an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit or insufficient positive information to meet such criteria.

PAR. 2. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 2455 Executive Park Boulevard, City of Fairborn, State of Ohio. Respondent is a state chartered, federally insured credit union.

PAR. 3. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the evaluation of applications for credit to be used for personal, family or household purposes. In a substantial number of instances respondent denies credit applications from consumers applying for credit that they intend to use for personal, family or household purposes. The Commission has jurisdiction of the subject matter of this proceeding and of respondent, as provided by Section 621 of the Fair Credit Reporting Act, 15 U.S.C. 1681s, and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

PAR. 4. Respondent, in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agencies. In a substantial number of instances subsequent to April 25, 1971, respondent has denied consumers credit for personal, family or household purposes based wholly or partly on information contained in consumer reports (including non-derogatory information such as insufficient positive information or a "no file" response) from the consumer reporting agency. In such instances, respondent has failed to disclose to the consumer at the time when such adverse action was communicated that the credit denial was based wholly or partly on information in a consumer report from a consumer reporting agency and to supply to the consumer the name and address of the consumer reporting agency making the report.

PAR. 5. By and through the use of the practices described in Paragraph Four, during the period from April 25, 1971 to the present

respondent has violated and is violating the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. Pursuant to Section 621(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a), the acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act and the Fair Credit Reporting Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wright-Patt Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 2455 Executive Park Boulevard, in the City of Fairborn, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions: For the purpose of this order the following definitions are applicable:

A. The terms *consumer, consumer report, consumer reporting agency* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no-file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating that the consumer reporting agency has no credit history information in its files under the name and other identifiers supplied by respondent.

C. The term *non-derogatory information* shall be defined as information in a consumer report, furnished to respondent by a consumer reporting agency, consisting of an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit, or insufficient positive information to meet such criteria.

I.

It is ordered, That respondent Wright-Patt Credit Union, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any application by a consumer for credit that is primarily for personal, family or household purposes, do forthwith cease and desist from:

1. Failing, whenever credit for personal, family or household purposes involving a consumer is denied wholly or partly or the charge for such credit is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency (including non-derogatory information such as insufficient positive information or a no-file response), to disclose to the applicant at the time the adverse action is communicated to the applicant a) that the adverse action was based wholly or partly on information contained in such a consumer report and b) the name and address of the consumer reporting agency making the report.

2. Failing to review each application for consumer credit for which it took adverse action between September 1, 1983, and the date of service of this order, to identify each of those applications for which

such adverse action was taken based wholly or partly upon information obtained from a consumer reporting agency.

3. Failing, within sixty (60) days of the date of service herein of this order, for each application identified according to Paragraph 2 above, to send the applicant, as specified herein, a copy of the notice letter attached hereto as Appendix A and described herein. The letter shall bear the name and address of the applicant as shown on the application, the date of mailing, and the name Wright-Patt Credit Union, Inc. No information other than that required by this paragraph shall be included in the notice letter, nor shall any other material be sent to the applicant with the notice letter. The notice letter shall disclose the name and address of the consumer reporting agency that prepared the report used according to Paragraph 2 above, together with the specific, principal reason(s) for the adverse action based on this information. A notice letter need not be sent to any applicant whose application was identified pursuant to Paragraph 2 above, if the application file clearly shows that respondent Wright-Patt Credit Union, Inc. has previously sent the applicant an adverse action notification in response to the application that complied in all respects with the provisions of Paragraph 1 of this order.

II.

It is further ordered, That respondent shall maintain for at least three (3) years and upon request make available to the Federal Trade Commission for inspection and copying documents that will demonstrate compliance with the requirements of this order. Such documents shall include, but are not limited to, all credit evaluation criteria instructions given to employees regarding compliance with the provisions of this order, any notices provided to consumers pursuant to any provisions of this order and the complete application file to which they relate.

III.

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

IV.

It is further ordered, That respondent shall deliver a copy of this order to cease and desist to all present and future employees engaged in reviewing or evaluating consumer reports or other third party information in connection with applications for credit to be used for personal, family or household purposes, or engaged in preparing or furnishing notices to consumers as required by this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ATTACHMENT A

Dear

A review of our records indicates that we denied a credit application you submitted sometime after September 1, 1983. At that time we may not have told you a source(s) of information we relied upon as federal law required.

Whenever a creditor rejects a credit application the Equal Credit Opportunity Act requires the creditor to tell the applicant the specific principal reasons for its decision. The Fair Credit Reporting Act requires the creditor to tell the applicant whenever the reasons for its decision are based on information obtained from a credit reporting agency (such as a credit bureau) or from another third party (such as an employer). The Fair Credit Reporting Act also entitles the applicant to learn from the credit bureau what information is contained in his or her credit file and to learn from the creditor the nature of other third party information that the creditor relied on in rejecting the application. We have agreed with the Federal Trade Commission to provide you this information at this time.

In denying your application, we relied upon information concerning your credit worthiness from the following consumer reporting agency or one or more third party sources:

Name _____
Address _____
_____

You have the right to contact the agency listed above to obtain complete information concerning your credit bureau file. However, that agency does not know why credit was denied, since it did not make that decision. We denied your credit application for the following reason(s):

_____

_____

_____

Sincerely,

Wright-Patt Credit Union

IN THE MATTER OF

HOSPITAL CORPORATION OF AMERICA

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9161. Complaint, July 30, 1982—Final Order, Oct. 25, 1985

This final order requires the nation's largest for-profit hospital chain, based in Nashville, Tenn., to divest North Park Hospital and Diagnostic Center Hospital, both in Hamilton County, Tenn., and any medical office buildings associated with the hospitals. The divestitures must be to different acquirers and obtain Commission approval. Respondent is also required to terminate its management contract with Downtown General Hospital, also in Hamilton County, and divest related real estate to a Commission-approved acquirer. Further, respondent is required to obtain FTC approval for any future acquisitions of certain hospitals in the Chattanooga, Tenn., area or any hospital meeting conditions specified in the order.

Appearances

For the Commission: *M. Elizabeth Gee, Toby G. Singer, Garry R. Gibbs, Oscar M. Voss* and *Erika Wodinsky.*

For the respondents: *Peter J. Nickles, William D. Iverson, K. Gregory Tucker* and *Michael A. Roth, Covington & Burling,* Washington, D.C. and *Margaret C. Mazzone, John W. Wade, Jr., Donald W. Fish* and *Jean L. Byassee,* in-house counsel, Nashville, Tenn.

COMPLAINT

The Federal Trade Commission having reason to believe that Hospital Corporation of America, a corporation subject to the jurisdiction of the Commission, has acquired the stock or assets of corporations subject to the jurisdiction of the Commission, hereinafter described, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and having further reason to believe that respondent has engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Acute care hospital,* hereinafter sometimes referred to as *hospital,* means an inpatient facility that furnishes care in connection with services of physicians for conditions for which nursing, medical or surgical services would be appropriate for care, diagnosis, or treatment, not including a facility specially intended for use in treatment of mental illness, emotional disturbance or substance abuse.

(b) The *Health Service Area,* hereinafter referred to as *HSA,* means the 13-county area encompassing the southeastern Tennessee counties of Hamilton, Bradley, [2] Marion, Sequatchie, Rhea, Meigs, McMinn, Bledsoe, Grundy and Polk, and the northern Georgia counties of Catoosa, Dade and Walker.

(c) *Hamilton County* means Hamilton County, Tennessee, the county in which the city of Chattanooga is located.

(d) The *Chattanooga Standard Metropolitan Statistical Area,* hereinafter referred to as *SMSA,* means the federally designated six-county area encompassing the southeastern Tennessee counties of Hamilton, Marion and Sequatchie, and the northern Georgia counties of Catoosa, Dade and Walker.

(e) A *managed* hospital means a hospital in which the owner (individual, corporate or public body) has contracted with a management company for that company to be responsible for the day-to-day operations of the hospital.

II. THE RESPONDENT

2. Respondent Hospital Corporation of America, hereinafter "HCA" or "respondent," is a corporation organized and existing under the laws of the State of Tennessee, with its principal executive offices at One Park Plaza, Nashville, Tennessee.

3. HCA is primarily engaged in the operation and management of proprietary hospitals in the United States and in foreign countries. It is the largest proprietary hospital chain in the United States and owns and operates acute care hospitals and psychiatric hospitals in 41 states throughout the country, including Tennessee. In HCA's Fiscal Year 1981, it had total revenues of approximately $2.3 billion in connection with these hospitals.

4. At all times relevant herein, the respondent has been and is now engaged in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. HCA

does business in a number of states and foreign countries. HCA and its hospitals in Hamilton County, the SMSA and the HSA, among other things: [3]

(a) purchase substantial amounts of supplies, equipment and medicines in interstate commerce from sources outside of the State of Tennessee;

(b) receive substantial revenues in interstate commerce from private and governmental insurers located outside of the State of Tennessee; and

(c) treat a substantial number of patients who travel from or reside outside the State of Tennessee.

5. Until the acquisitions described in Section III below, HCA owned only one acute care hospital, Parkridge Hospital, in Hamilton County and the SMSA and only three acute care hospitals, Parkridge Hospital, Athens Community Hospital and Cleveland Community Hospital, in the HSA. Until the acquisitions described in Section III below, HCA's psychiatric facilities in the HSA consisted only of one psychiatric unit in an acute care hospital, Cleveland Community Hospital.

III. THE ACQUISITIONS

Hospital Affiliates International, Inc.

6. On August 26, 1981, HCA purchased Hospital Affiliates International, Inc. ("HAI"). In consideration thereof, HAI's parent corporation received approximately $425 million in cash and approximately $225 million in HCA voting stock.

7. Prior to its acquisition by HCA, HAI was a wholly owned subsidiary of INA Health Care Group, a wholly owned subsidiary of INA Corporation. HAI was a corporation organized and existing under the laws of Delaware, with its executive offices in Tennessee. HAI owned, operated, and managed acute care hospitals and psychiatric hospitals in 33 states and several foreign countries. For its Fiscal Year 1980, HAI's revenues derived from its acute care and psychiatric hospitals were over $513 million. HAI owned or managed three hospitals in Hamilton County: it owned Diagnostic Hospital; it managed Downtown General Hospital and Red Bank Community Hospital. HAI owned or managed five hospitals in the SMSA and the HSA: it owned Diagnostic Hospital and Sequatchie General Hospital; it managed Downtown General Hospital, Red Bank Community Hospital and South Pittsburg Municipal Hospital.

8. At all times relevant herein, HAI was engaged in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and was a corporation whose business was in or affecting commerce within the meaning of Section 5 of the Federal

Trade Commission Act, as amended, 15 [4] U.S.C. 45. HAI did business in a number of states and foreign countries. HAI and its hospitals in Hamilton County, the SMSA and the HSA, among other things:

(a) purchased substantial amounts of supplies, equipment and medicines in interstate commerce from sources outside of the State of Tennessee;

(b) received substantial revenues in interstate commerce from private and governmental insurers located outside of the State of Tennessee; and

(c) treated a substantial number of patients who travel from or reside outside the State of Tennessee.

Health Care Corporation

9. On December 11, 1981, HCA purchased Health Care Corporation ("HCC"), for which it paid HCC's owners approximately $30 million, including approximately $20 million in HCA stock, and assumption of approximately $10 million of HCC liabilities. HCC became a wholly owned subsidiary of HCA.

10. Prior to its acquisition by HCA, HCC was a corporation organized and existing under the laws of Tennessee, with its executive offices in Chattanooga, Tennessee. HCC owned or managed acute care and psychiatric hospitals in three states. In Hamilton County, the SMSA and the HSA, HCC owned one acute care hospital, Medical Park Hospital, and one psychiatric facility, Valley Psychiatric Hospital. In 1980, HCC's gross revenues from its operations were approximately $9.8 million.

11. At all times relevant herein, HCC was engaged in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and was a corporation whose business was in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. HCC did business in at least three states. HCC and its hospitals in Hamilton County, the SMSA and the HSA, among other things:

(a) purchased substantial amounts of supplies, equipment and medicines in interstate commerce from sources outside of the State of Tennessee;

(b) received substantial revenues in interstate commerce from private and governmental insurers located outside of the State of Tennessee; and [5]

(c) treated a substantial number of patients who travel from or reside outside the State of Tennessee.

IV. COUNT I: ACUTE CARE HOSPITAL SERVICES MARKET

Trade and Commerce

12. For purposes of this complaint and this count, the relevant product market is acute care hospital services, or any submarkets thereof, excluding psychiatric services,

13. For purposes of this complaint and this count, the relevant geographic market is Hamilton County, the SMSA, or the HSA or any submarkets thereof.

14. Prior to the acquisitions of HAI and HCC, the acute care hospital services market in the geographic market was concentrated. Two-firm concentration was approximately 57–59% in Hamilton County, approximately 46–49% in the SMSA, and approximately 40–42% in the HSA. Four-firm concentration was approximately 84–88% in Hamilton County, approximately 75–78% in the SMSA, and approximately 65–68% in the HSA.

15. Barriers to entry are high in the acute care hospital services market in Hamilton County, in the SMSA and in the HSA. These barriers include, among others, substantial capital costs, and the health planning laws, especially given the number of existing beds in the geographic market.

Effects of the Acquisitions

16. As a result of its acquisition of HAI, HCA increased its market share of acute care hospital services in Hamilton County from approximately 16–18% to approximately 27–29%, in the SMSA from approximately 13–15% to approximately 28–30%, and in the HSA from approximately 16–17% to approximately 28–30%. Two-firm concentration increased in Hamilton County from approximately 57–59% to approximately 65–66%, in the SMSA from approximately 46–49% to approximately 59–61%, and in the HSA from approximately 40–42% to approximately 53–54%. Four-firm concentration increased in Hamilton County from approximately 84–88% to approximately 91–95%, in the SMSA from approximately 75–78% to approximately 85–90%, and in the HSA from approximately 65–68% to approximately 73–78%.

17. As a result of its acquisition of HCC, HCA increased its market share of acute care hospital services in Hamilton County from approximately 27–29% to approximately 31–32%, in the SMSA from approximately 28–30% to approximately 32–33%, and in the HSA from approximately 28–30% to approximately 30–32%. Two-firm [6] concentration increased in Hamilton County from approximately 65–66% to approximately 69–71%, in the SMSA from approximately 59–61% to approximately 62–64%, and in the HSA from approxi-

mately 53–54% to approximately 55–56%. Four-firm concentration increased in Hamilton County from approximately 91–95% to approximately 96–98%, in the SMSA from approximately 85–90% to approximately 88–93%, and in the HSA from approximately 73–78% to approximately 75–80%.

18. Through its acquisitions of HAI and HCC, HCA acquired direct and actual competitors in the market for acute care hospital services in Hamilton County, in the SMSA and in the HSA.

19. The effects of the HAI and HCC acquisitions by HCA, individually and together, may be substantially to lessen competition or tend to create a monopoly in the relevant product and geographic market in the following ways, among others:

(a) actual and potential competition has been eliminated among some acute care hospitals;

(b) concentration in the market has been substantially increased;

(c) patients and physicians may be denied the benefits of free and open competition based on price, quality, and service;

(d) competition among hospitals for patients and physicians may be substantially impaired;

(e) competition among some hospitals for patient referrals may be diminished or eliminated;

(f) Medicaid patients may be foreclosed from use of some hospitals now controlled by HCA; and

(g) collusion or artificial price increases may be facilitated, and the risk of collusion will be aggravated.

Violation Charged

20. The acquisitions of HAI and HCC, individually and together, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. [7]

V. COUNT II: PSYCHIATRIC SERVICES MARKET

Trade and Commerce

21. For purposes of this complaint and this count, the relevant product market is inpatient psychiatric treatment services excluding substance abuse treatment services and long-term treatment of chronic mental illness, hereinafter "psychiatric services," or submarkets thereof.

22. For purposes of this complaint and this count, the relevant geographic market is the HSA.

23. Prior to the HCC acquisition the market was highly concentrated with a two-firm concentration ratio of 93% and a three-firm con-

centration ratio of 100%. There were only two private firms in the market providing psychiatric services.

24. Barriers to entry are high in the market. These barriers include, among others, substantial capital costs and the health planning laws, especially given the number of existing beds in the market.

Effects of the HCC Acquisition

25. As a result of HCA's acquisition of HCC, HCA has increased its share of the market for psychiatric services in the HSA from approximately 7% to approximately 38%. Two-firm concentration is now 100%, and there is now only one private firm in the market providing psychiatric services.

26. Through its acquisition of HCC, HCA has acquired a direct and actual competitor in the market.

27. The effects of the acquisition of HCC by HCA may be substantially to lessen competition or tend to create a monopoly in the relevant product and geographic market in the following ways, among others:

(a) actual and potential competition between HCA and HCC in the provision of psychiatric services has been eliminated;

(b) concentration in the market has been substantially increased;

(c) patients and physicians may be denied the benefits of free and open competition among psychiatric facilities based on price, quality and service; and [8]

(d) HCA may have secured the power to raise prices, and its incentives to provide high quality psychiatric treatment services may be reduced.

Violation Charged

28. The acquisition of HCC constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

OCTOBER 30, 1984

I. HISTORY OF THE PROCEEDING

On July 30, 1982, the Federal Trade Commission issued a complaint charging that Hospital Corporation of America ("HCA") had violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by purchasing two corporations, Hospital Affiliates International, Inc. ("HAI") and Health Care Corporation ("HCC").

According to the complaint, HCA, a Tennessee corporation, is the largest operator and manager of acute care and psychiatric hospitals in the United States. Prior to their acquisitions by HCA, HAI and HCC also owned, operated and managed acute care and psychiatric hospitals in several states of the United States, but the complaint challenges only the acquisitions of hospitals or contracts to manage hospitals within: (1) the "Health Service Area," a 13-county area in southeastern Tennessee and northern Georgia; (2) Hamilton County, the county in which the city of [2] Chattanooga, Tennessee is located; (3) the Chattanooga Standard Metropolitan Statistical Area ("SMSA"); and (4) any submarkets within these markets.

Count I of the complaint defines the relevant product market as acute care hospital services, or any submarkets thereof, excluding psychiatric services. The alleged relevant geographic markets are described above.

Count II of the complaint defines the relevant product market as inpatient psychiatric treatment services excluding substance abuse treatment services and long-term treatment of chronic mental illness, or submarkets thereof. The relevant geographic market in Count II is claimed to be the HSA.

Count I alleges that as a result of the challenged acquisitions, HCA acquired direct and actual competitors in the acute care hospital services market in Hamilton County, the SMSA and the HSA or submarkets thereof and that the effect of these acquisitions in the relevant product and geographic markets may be substantially to lessen competition or tend to create a monopoly in the following ways:

(a) actual and potential competition has been eliminated among some acute care hospitals;

(b) concentration in the market has been substantially increased;

(c) patients and physicians may be denied the benefits of free and open competition based on price, quality, and service;

(d) competition among hospitals for patients and physicians may be substantially impaired;

(e) competition among some hospitals for patient referrals may be diminished or eliminated;

(f) Medicaid patients may be foreclosed from use of some hospitals now controlled by HCA; and

(g) collusion or artificial price increases may be facilitated, and the risk of collusion will be aggravated.

Count II alleges that as a result of its acquisition of HCC, HCA acquired a direct and actual competitor in the psychiatric services market and that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant product and geographic market in the following ways: [3]

(a) actual and potential competition between HCA and HCC in the provision of psychiatric services has been eliminated;

(b) concentration in the market has been substantially increased;

(c) patients and physicians may be denied the benefits of free and open competition among psychiatric facilities based on price, quality and service; and

(d) HCA may have secured the power to raise prices, and its incentive to provide high quality psychiatric treatment may be reduced.

The relief sought in the complaint is an order:

(a) Divesting in whole or in part the assets and contracts acquired by HCA from the HAI and HCC acquisitions in the market, so as to form independent viable entities;

(b) Prohibiting HCA in some or all markets from making any future acquisition of any acute care hospital or psychiatric facility, or any contract for the management thereof, in competition with any other hospital it owns or manages, without prior Commission approval, for a period of years;

(c) Requiring HCA to file compliance reports with the Commission and to give prior notice of any changes in corporate form or organization which would affect compliance obligations under the order entered; and

(d) Containing other provisions reasonable and appropriate to correct or remedy the alleged anticompetitive practices engaged in by HCA.

On June 9, 1983, upon motion of complaint counsel who asserted that the possible relief for the violation alleged in Count II would not justify the expenditure of resources necessary fully to litigate the

issues raised by it, I dismissed that count. Thus, this initial decision deals only with the factual and legal issues raised in Count I. [4]

After extensive discovery, hearings began in Washington, D.C. on November 28, 1983, continued in Chattanooga, Tennessee, and concluded in Washington on May 31, 1984. The record was not closed, however, until July 13, 1984 because the parties offered some documents into evidence in subsequent written motions. The parties filed their proposed findings of fact, conclusions of law and proposed orders on July 23, 1984. Answers were filed on August 6, 1984. At my request, the Commission granted me an extension of time to November 5, 1984 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. Findings of Fact

A. *The Nature of HCA's Business*

1. HCA is a corporation organized and existing under the laws of the State of Tennessee, with its principal executive offices at One Park Plaza, Nashville, Tennessee (Cplt. ¶ 2; Ans. ¶ 2).[1] HCA is primarily engaged in the operation and management [5] of proprietary acute care and psychiatric hospitals[2] in the United States and in several foreign countries, both for its own account and for other owners (Ans. ¶ 3). It is the largest proprietary hospital chain in the United States (Cplt. ¶ 3; Ans. ¶ 3; CX's 427N, 13D).

2. HCA was founded in 1968 by Jack C. Massey, Thomas Frist, M.D. and Thomas Frist, Jr., M.D. with one health care facility in Nashville, Tennessee (CX 9A). By 1973, HCA owned 51 hospitals (CX 9A), and

[1] The following abbreviations are used in this decision:

CX – Commission exhibit
RX – Respondent's exhibit
CPF – Section number and finding in complaint counsel's proposed findings of fact
CB – Complaint counsel's brief in support of their findings of fact
CAB – Complaint counsel's answering brief
RPF – Respondent's proposed findings of fact
RB – Respondent's brief in support of its findings of fact
RAB – Respondent's answering brief
F. – Finding number in this decision
Cplt. – Complaint
Ans. – Answer

[2] The complaint defines an acute care hospital as an inpatient facility that furnishes care in connection with services of physicians for conditions for which nursing, medical or surgical services would be appropriate for care, diagnosis, or treatment, not including a facility specially intended for use in treatment of mental illness, emotional disturbance or substance abuse (Cplt. ¶ I 1(a)).

by 1978, it owned or managed under contract 100 hospitals and had grown to 28,000 employees with more than 5,000 shareholders (CX 9B). From 1978 through 1982, HCA increased the number of hospitals it owned and managed by more than 200%. Approximately 80% of this growth resulted from acquisitions (CX 13I). HCA operates 390 hospitals around the world (Tr. 3238), and it owns or leases approximately 200 hospitals and manages 170 in the United States (Tr. 3737; CX 13I).

3. Prior to HCA's acquisition of HAI and HCC, as of December 30, 1980, it owned 114 hospitals in the United States and provided management services to 56 hospitals in this country. In 1980, HCA had total assets worth $1,610 million and had earned $81 million on revenues of $1,429 million (CX 8B, V).

4. Prior to the challenged acquisitions, HCA owned one hospital in Chattanooga, Parkridge Hospital, and two hospital facilities in outlying southeast Tennessee communities: Cleveland Community Hospital in Cleveland, Tennessee and Athens Community Hospital in Athens, Tennessee (Cplt. ¶ 5; Ans. ¶ 5; Stipulation, November 3, 1983).

B. *The Challenged Acquisitions*

1. The HAI Acquisition

5. HAI was a proprietary hospital management company organized and existing under the laws of the State of Delaware and was a wholly-owned subsidiary of INA Health Care Group, Inc. which was a wholly-owned subsidiary of INA Corporation, whose primary line of business is insurance (CX 272B). [6]

6. At the time of the acquisition in August 1981, HAI owned or leased 57 hospitals and managed 78 hospitals nationwide (CX's 6E, 8K). In 1980, it had total assets worth $509 million and had earned $29 million on revenues of $704 million (CX 272K, M). In August 1981, HCA acquired HAI for approximately $650 million in a stock transaction (Cplt. ¶ 6; Ans. ¶ 6; CX's 8Z–13, 13N, 535, p. 3).

2. HCA's Acquisition of HAI's Chattanooga Area Acute Care Hospitals

7. Prior to its acquisition by HCA, HAI owned or managed five acute care hospitals in the Chattanooga area, and HCA acquired ownership or management of these hospitals when it acquired HAI (Cplt. ¶ 7; Ans. ¶ 7). Three of the hospitals, Diagnostic (owned) Downtown (managed) and Red Bank (managed) are located in Chattanooga or its suburbs (CX's 50A, 51A, 56A, 27D). The other two, Sequatchie (owned) and South Pittsburg (managed) are located in counties adjacent to Hamilton County, the county in which Chattanooga is located.

3. The HCC Acquisition

8. At the time of the acquisition, HCC, a psychiatric hospital management company, owned three psychiatric hospitals located in Texas and Tennessee, and a single acute care hospital, Medical Park Hospital in Chattanooga (CX 10P, Z–3). In a December 1981 stock transaction, HCA acquired HCC for approximately $30 million (Cplt. ¶ 9; Ans. ¶ 9).

4. HCA's Acquisition of HCC's Chattanooga Area Acute Care Hospital

9. Medical Park, which HCC owned, was an 83-bed general acute care hospital located in downtown Chattanooga (CX 10P, Z–3).

C. *Acute Care Hospitals In Chattanooga And The Surrounding Area*

1. The Chattanooga Area

10. The city of Chattanooga, Tennessee, situated in Hamilton County in southeast Tennessee on the state boundary with northwest Georgia (RX 1079 (3); CX 15, p. 14), has a population [7] of 170,000 according to the 1980 census (RX 920 (9)). Hamilton County has a population of approximately 288,000 (CX 15, p. 16). Chattanooga is the major city in two federally-designated geographic areas: the Metropolitan Statistical Area ("MSA") and the Georgia-Tennessee Health Service Area ("HSA").

11. An MSA is a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus (45 Fed. Reg. 956 (1980)). The Chattanooga MSA is a six-county area consisting of the Tennessee counties of Hamilton, Marion, and Sequatchie and the Georgia Counties of Walker, Dade, and Catoosa (CX's 484L, 32Z–118). It has a population of approximately 426,540 (CX 15, p. 16).

12. An HSA is the area designated by the Department of Health and Human Services as a region in which state and local health planners are to assess and identify the health needs of the population in that region (42 U.S.C. 3001(a) (1982)).

13. The HSA that includes Chattanooga is composed of thirteen counties: ten in southeastern Tennessee (Bledsoe, Bradley, Grundy, Hamilton, Marion, McMinn, Meigs, Polk, Rhea, and Sequatchie counties) and three in northwest Georgia (Catoosa, Dade, and Walker counties) (CX 15, p. 1). In 1980, it had a population of approximately 604,498 (CX 15, p. 16).

14. Other cities in the area surrounding Chattanooga include Dalton in Whitfield County, Georgia, an industrialized community with

a 1980 population of approximately 21,000 (RX 921 (7); Tr. 3296). Dalton is approximately 40 minutes southeast of downtown Chattanooga on Interstate 75 South (RX's 1030 (3); 1089).

15. Cleveland, situated in Bradley County, Tennessee, approximately 40 minutes northeast of downtown Chattanooga on Interstate 24 East (RX's 1030 (2–3), 1089), is an industrialized community with a 1980 population of approximately 26,000 (RX 920 (4); Tr. 3296).

16. South Pittsburg, in Marion County, Tennessee, is on the Tennessee-Alabama state boundary west of downtown Chattanooga across the Tennessee River (RX 1079 (3)). South Pittsburg is approximately 40 minutes from downtown Chattanooga (RX's 1030 (3), 1089). The 1980 population of South Pittsburg was approximately 3,600 (RX 920 (6)).

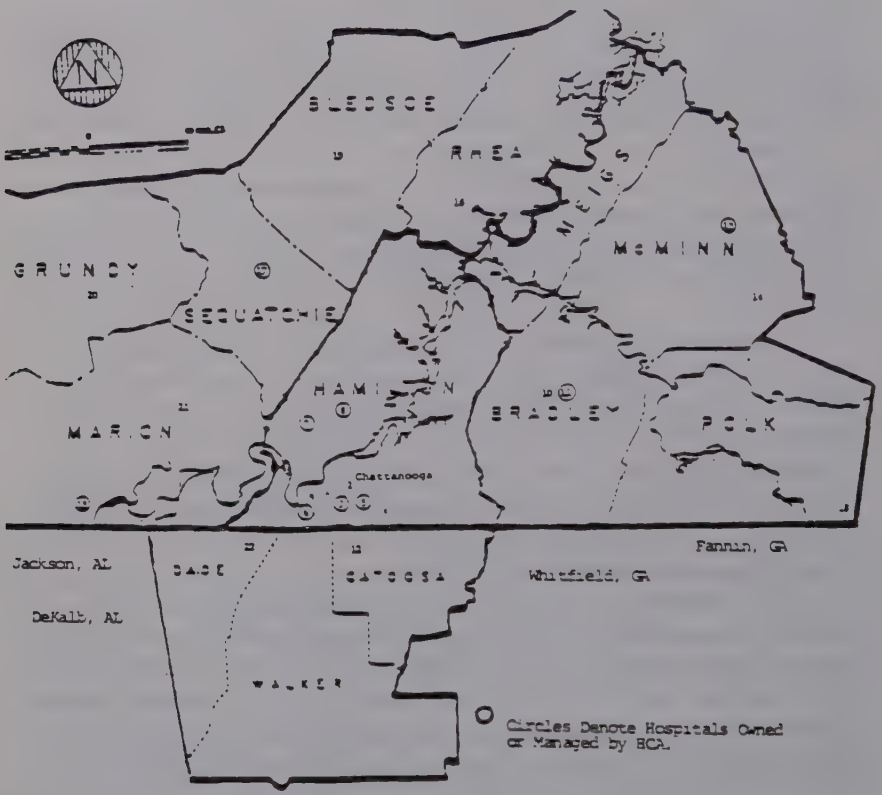
17. Dunlap, in Sequatchie County, Tennessee, is approximately 45 minutes from downtown Chattanooga over Signal Mountain and Walden Ridge (RX's 1030 (4), 1089; CX 15, p. 14). The population of Dunlap in 1980 was approximately 3,700 (RX 920 (8)) [8].

18. Whitwell, in Marion County, is approximately 40 minutes west of downtown Chattanooga over Suck Creek Mountain (RX's 1030 (4–5), 1089, 1079 (3)). The 1980 census for Whitwell showed a population of approximately 1,800 (RX 920 (6)).

19. The largest community in the Tennessee counties of Grundy, Bledsoe, Rhea, Meigs, McMinn and Polk is Athens with a 1980 population of approximately 12,000 (RX 920 (4–8)). Athens is situated just off Interstate 24, north of Cleveland, approximately halfway between Chattanooga and Knoxville (Tr. 282). Dayton, Tennessee in Rhea County had a 1980 population of approximately 6,000 (RX 920 (8)).

2. Hospitals In The Chattanooga HSA

20. The map on the following page shows the approximate locations of the hospitals in the Chattanooga HSA. [9]



Numbers Show the Locations of the Following Hospitals Within Counties in Tennessee and Georgia:

1. Erlanger Medical Center
2. Memorial Hospital
3. Parkridge Hospital
4. East Ridge Community Hospital
5. Diagnostic Center Hospital
6. Downtown General Hospital
7. Red Bank Community Hospital
8. North Park Hospital
9. Metropolitan Hospital
10. Bradley County Memorial Hospital
11. Cleveland Community Hospital
12. John L. Hutcheson Memorial Tri-County Hospital
13. Athens Community Hospital
14. Woods Memorial Hospital
15. South Pittsburg Municipal Hospital
16. Rhea County Medical Center
17. Sequatchie General Hospital
18. Copper Basin Medical Center
19. Bledsoe County Hospital
20. Grundy County General Hospital
21. Whitwell Hospital
22. Wildwood Sanitarium

[10]3. The MSA

a. *Hamilton County, Tennessee*

21. There are nine general acute care hospitals in Hamilton County, and HCA either owned, or, as a result of its acquisitions became the owner or manager of, five hospitals in this county.

22. *Erlanger Medical Center,* located in downtown Chattanooga on East Third Street near the Tennessee River (RX 1079 (3); CX 66A), is a non-profit teaching hospital owned and operated by the Chattanooga Hamilton County Hospital Authority, a public agency created by state statute in 1976. It is controlled by a politically appointed board of trustees (RX 761 (3); Tr. 90, 109, 3289). Erlanger is a major medical complex with several different hospital buildings, including a general acute care hospital, Baroness Erlanger Hospital, and several other facilities (Tr. 96–97, 107, 489). It provides a wide range of health care services to the community, and it is the only tertiary care referral center in the HSA[3] (Tr. 92, 94–95; CX's 15, p. 142; 18Z–44). While it has a certificate of need (F. 252) for 780 beds, only 754 are licensed. Of these 754 [11] licensed beds, only 714 are in actual use (Tr. 130, 132). The full number of certificate-of-need beds is expected to be put into use sometime in 1985 (Tr. 133).

23. Erlanger is required by law to accept all Hamilton County residents needing hospital care, regardless of their ability to pay, and has the image of a "public" hospital (Tr. 110–11; CX 408Z–17). It treats the vast majority of indigent patients in Hamilton County, and at least 100 beds are used for the treatment of these patients[4] at all times (Tr. 115, 134, 883, 138; CX's 18Z–44, 32Z–8, 38Z–17). Erlanger has several specialized intensive care units including a trauma unit, a neurosurgical intensive care unit, and a burn unit, which are unique and not available anywhere else in the area (Tr. 1374–75, 1408–09; CX 15, pp. 93–94).

24. The Erlanger complex includes a pediatric hospital, T.C. Thompson Children's Hospital (Tr. 96, 107). Children's Hospital is a

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[3] Hospitals are classified from most basic to most advanced as primary, secondary, or tertiary facilities. A primary hospital generally provides basic acute care services, such as obstetrics (unless such services are organized regionally), surgical services, x-ray, clinical laboratory, and blood services, a minimal level emergency room, pharmacy and anesthesia services, and minimal intensive care capabilities. A secondary level facility generally has the primary services listed above and, in addition, more specialized capabilities such as EEG equipment, diagnostic and therapeutic equipment for cancer patients and 24-hour physician coverage. A tertiary level hospital generally has the same facilities as the other two levels, and is available as a primary level hospital for the majority of its patients, but also has specialized services as are needed in the community, such as open heart surgery capabilities, cardiovascular diagnostic lab, CT scanner, burn-care unit, and oncology (cancer) services (CX 15, pp. 141–42). A referral hospital is one that because of the level of sophistication of its services is able to attract patients from smaller facilities having more limited services and capabilities (Tr. 123, 442, 615, 747, 1507–08, 1967–68, 3277, 1388).

[4] Indigent patients are economically-disadvantaged individuals who have no form of health insurance coverage and who do not qualify for Medicaid (Tr. 110).

114-bed facility that is used exclusively for pediatric patients (Tr. 100–01, 130).

25. Willie D. Miller Eye Center, a 30-bed specialty eye center, is also a part of Erlanger. It is located adjacent to Baroness Erlanger Hospital and is used exclusively for the treatment of eye diseases (Tr. 107–08, 131).

26. Erlanger also operates a 13-bed emergency psychiatric "holding unit" that is used exclusively to treat patients needing psychiatric care. It is the only psychiatric emergency facility in the area and many of the patients treated there are indigent. It is located in a maximum security wing of the hospital that is not easily accessible. The psychiatric unit is operated by a nursing staff specially trained in the care of psychiatric patients (Tr. 118–20).

27. *Memorial Hospital* is located on Citico Avenue in the downtown area of Chattnooga. It is a non-profit institution which is owned and operated by the Catholic Church (Tr. 1503; CX 53A; RX 1079 (3)). In 1981, Memorial Hospital was authorized by the Tennessee Health Facilities Commission to operate 349 general acute care hospital beds (RX 1092). In 1982, its authorized bed total was increased to 365 (RX 872).

28. Memorial Hospital has secondary capabilities but offers some tertiary services. It offers such sophisticated specialties as cardiovascular catheterization, open heart surgery, nuclear medicine, radiation therapy and neurological procedures. The [12] hospital's emergency room is staffed by physicians on a 24-hour basis (Tr. 1505, 1507, 3291, 136; CX's 15, p. 142, 29Z–5).

29. *Parkridge Hospital,* owned by HCA before the acquisitions, is located on McCallie Avenue in downtown Chattanooga (CX 36A; RX 1079 (3)). It is a medical/surgical hospital which offers diagnostic and therapeutic services usually found in major urban hospitals (Tr. 3276).

30. Parkridge Hospital was in 1981, and is today, authorized by the Tennessee Health Facilities Commission to operate 296 general acute care hospital beds (Tr. 3276; RX 1092). Parkridge is basically a secondary level hospital with some tertiary capabilities (Tr. 127, 276, 686; CX 15, p. 142).

31. *East Ridge Community Hospital* is located in the East Ridge community approximately six miles east of downtown Chattanooga adjacent to the intersection of Interstate 75 and Interstate 24 (Tr. 678, 750; RX 1079 (3)). It is a general acute care hospital authorized by the Tennessee Health Facilities Commission to operate 128 beds (Tr. 680; RX 1092). The hospital offers most of the medical and surgical services commonly found in suburban hospitals of its size, and has an active obstetrical practice, in which it provides secondary level care (Tr.

680–81, 146, 3291). East Ridge is owned and operated by Humana, Inc., a large, for-profit hospital chain (Tr. 682; CX 83A, F).

32. *Diagnostic Center Hospital,* an 80-bed facility on McCallie Avenue in downtown Chattanooga, which HAI owned before its acquisition by HCA, specializes in the diagnosis and treatment of cardiopulmonary disease (Tr. 3592). It was established in the late 1950's by the physicians who were the founding members of the Diagnostic Center Medical Group. All of the inpatient admissions to Diagnostic Center Hospital are made by the nine physicians in the Diagnostic Center Medical Group (Tr. 3592–93).

33. Diagnostic Center Hospital has no operating room or other surgical facilities, and the hospital's services are strictly non-invasive (Tr. 3593).

34. *Red Bank Community Hospital* is a 57-bed general acute care hospital located in the Red Bank community north of the Tennessee river, and was managed by HAI prior to the acquisitions (Cplt. ¶ 7; Ans. ¶ 7; Tr. 1171; RX 1079 (3); CX's 38–2–42, 27D, 56A-F). Red Bank is a not-for-profit hospital owned by the Health and Educational Facilities Board of the City of Red Bank and is leased to the Red Bank Hospital Association (Tr. 1171; CX 628).

35. *Medical Park Hospital* (North Park) was in 1981 an 83-bed facility on McCallie Avenue in downtown Chattanooga and was owned by HCC before its acquisition by HCA (Tr. 138; CX 75A; RX's 1092, 1079 (3)). [13]

36. Medical Park was granted a certificate of need by the Tennessee Health Facilities Commission in October 1980 authorizing its relocation to the suburban north Chattanooga community of Hixson (CX 19V; RX 858). North Park Hospital, owned by HCA (CX 895G) and located in the north Chattanooga suburbs, is a new facility opened on November 15, 1982, which replaces Medical Park Hospital (Tr. 3291; CX 504E).

37. North Park does not provide neurological surgery, open heart surgery, major trauma treatment or obstetrics. The hospital administration expects to add obstetric services within the next several years if there is demand for the services and physician support. The new facility has the latest technology available for the medical and surgical specialties and services generally offered in suburban hospitals. It offers primary and limited secondary level services. Because of its suburban setting in the outlying community of Hixson, the hospital emphasizes outpatient procedures (Tr. 137, (Tr. 137, 545–46, 585, 3398; CX's 15, p. 142, 20Z–52).

38. *Downtown General* is a 65-bed urban general acute care hospital which is located in central downtown Chattanooga and was established as a not-for-profit hospital in 1975 (Tr. 1417–23; CX 51A, F, 15,

p. 179). HAI managed Downtown General before its acquisition by HCA (Cplt. ¶ 7; Ans. ¶ 7).

39. *Metropolitan Hospital,* formerly Tepper Hospital, is a 64-bed proprietary hospital owned and operated by American Healthcorp, Inc., which purchased the facility in 1982 (Tr. 1045, 1089–90; CX 58A, F). Tepper was a pediatric hospital formerly owned by a pediatrician whose four-person physician group practices at the hospital (Tr. 1089–90). Metropolitan now provides some diabetes services to adults but still focuses primarily on pediatrics (Tr. 454, 1090–91). Approximately 70% of its patients are pediatric (Tr. 1091), but since 1981, its gynecology, orthopedics, family practice, internal medicine and general surgery services have been expanded (RX 731 (20)).

b. *Other Hospitals In The MSA*

40. There are five hospitals outside of Hamilton County but in the MSA. Two of them are located near Chattanooga, just over the Georgia state line.

41. *John L. Hutcheson Memorial Tri-County Hospital* (Tri-County), is located in the Ft. Oglethorpe community in the Georgia suburbs just across the state line and about ten miles from Chattanooga, Tennessee (RX 1979 (3)). Tri-County is owned by the Hospital Authority of Walker, Dade and Catoosa Counties (RX 646 (10)), a body "corporate and politic" created pursuant to Georgia statute in 1947 (RX 646 (4–5)). The Authority is [14] controlled by a nine-member Board of Trustees nominated by the County Commissioners of the three Georgia counties (RX 679 (6)).

42. Tri-County is a medical/surgical hospital which provides primary and secondary services comparable in range and sophistication to those of Parkridge Hospital (Tr. 117, 3289). In addition to the services which are also available at Parkridge, Tri-County has a hospital unit dedicated exclusively to pediatric care including pediatric intensive care, and an obstetrics service (CX 106C). Tri-County was authorized by the State of Georgia on September 8, 1981, to operate 237 general acute care hospital beds (RX 911). It provides care for indigents and Medicaid recipients in northwest Georgia (Tr. 116, 685; RX 361 (60)).

43. *Wildwood Sanitarium & Hospital* is a 39-bed facility located in Dade County, Georgia, approximately 10 minutes from Chattanooga (Tr. 3290; CX's 92A-B, 15, p. 142). It is owned by the Seventh Day Adventist Church (Tr. 3290, 692, 150). It provides non-traditional services such as alcohol, diet, and non-smoking programs (Tr. 1511). While its medical services are limited in scope (Tr. 692, 1511), and it is not JCAH accredited,[5] it does provide general medical services and

[5] The Joint Commission on Accreditation of Hospitals ("JCAH") is a non-profit organization that sets guidelines (footnote cont'd)

obstetrics, surgery, respiratory, therapy, physical therapy, audiology, diagnostic radiology, electrocardiography, cardiac rehabilitation, emergency treatment, and psychiatric care (Tr. 3290; CX 92B, D-E). Wildwood is not considered a competitor by HCA facilities in the Chattanooga area, according to their planning documents (CX's 17Z–35, 18Z–43, 20Z–11, 27I, 28Z–2, 32Z–45, 34E-F, 82Z–11, 235Z–23; *see also* Tr. 1512).

44. *South Pittsburg Municipal Hospital,* a city-owned facility in South Pittsburg, Tennessee, is managed by HCA pursuant to a long-term contract (CX 21). The hospital was approved for 107 beds in 1981 (RX 1093). It is comparable to the smaller Chattanooga hospitals in terms of quality and range of services (Tr. 690).

45. A drive from downtown Chattanooga to South Pittsburg Municipal Hospital on January 18, 1984 required 41 minutes and 17 [15] seconds by the most direct route under good-to-excellent, non-rush hour driving conditions (RX's 1089, 1030 (3)).

46. *Sequatchie General Hospital* is a small primary care facility in the rural community of Dunlap, Tennessee, situated in Sequatchie County northwest of Chattanooga over Signal Mountain and Walden Ridge (CX 15, p. 14; RX 1079 (3)).

47. Sequatchie General was acquired by HCA as part of the acquisition of HAI in 1981 (Tr. 3253–56; CX 874, pp. 18–19). In December 1982, HCA sold Sequatchie along with 18 other hospitals to Republic Health Corporation in exchange for cash, notes, stock and assumption of debt. As a result of this transaction, HCA obtained ownership of approximately one-third of the common stock of Republic (Tr. 544–45; CX 874, pp. 3, 18–19). A "voting agreement" between HCA and Republic gives HCA the right to elect a majority of Republic's board of directors if Republic fails to meet certain specified conditions (Tr. 545; CX 874, p. 16). HCA currently owns about 20% of Republic's stock (Tr. 3265).

48. *Whitwell Community Hospital* is a 25-bed facility located in Marion County, approximately 18 miles from Chattanooga (CX's 44A, F, 15, p. 142). It is a very old facility with a two-person medical staff (Tr. 617; CX 15, p. 138), and does not meet state codes and standards (Tr. 691). One witness testified that he didn't "think you would call it a general acute care hospital" (Tr. 691), whereas another witness stated that it is more like a "clinic" and is "really not a hospital at all" (Tr. 1511).

49. Whitwell was purchased by Rural Hospital Associates Inc. in

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for hospitals in order to improve and to maintain the basic quality of care of their medical staff and facilities (Tr. 741). JCAH accreditation means that a hospital meets certain minimum standards of quality (Tr. 256, 1103–04, 2284; CX's 175, 250C). It is the "Good Housekeeping Seal of Approval" for hospitals. Tennessee accepts JCAH approval as sufficient to receive state licensing approval and hospitals with JCAH approval are deemed qualified to participate in the Medicare program (Tr. 257).

1982 (CX 404B, S; RX 1093). Rural Hospital Associates is now building a new $5.5 million facility to replace the existing Whitwell facility (CX 404Z–14, Z–20). The certificate-of-need for the 40-bed replacement facility was approved November 1, 1982 (RX 876).

50. A drive from Whitwell Community Hospital to downtown Chattanooga on January 19, 1984, required 39 minutes and 47 seconds by the most direct route under good-to-excellent, non-rush hour driving conditions (RX 1030 (4–5)).

4. Hospitals In The HSA Outside Of The MSA

51. Outside of the MSA, but in the HSA, are eight hospitals, two of which, Cleveland Community Hospital and Athens Community Hospital, are owned by HCA.

52. *Cleveland Community Hospital,* formerly named Cherokee Park Hospital, is a 100-bed full-service community hospital located in Cleveland, Tennessee (CX's 71A, 15, p. 179, 148D), a city which has experienced 50% growth since 1970. It is approximately 30 miles from Chattanooga (CX's 148Z–16, 235Z–[16]14). Cleveland Community Hospital has a 20-bed psychiatric unit located in a separate wing from the rest of the hospital (Tr. 3489–90; CX 15, p. 268; HCA's Response to Interrogatory 18, filed Apr. 20, 1983). This unit is used exclusively for psychiatric patients (Tr. 3490). HCA obtained Cleveland Community Hospital through its 1980 acquisition of General Care Corporation (CX's 546A, 566A, 487A, 11Z–17). The hospital is approximately 41 minutes from downtown Chattanooga by auto (RX's 1098, 1030 (2–3)).

53. As an example of the isolation of the hospital from Chattanooga, Jim Whitlock, administrator of Cleveland Community Hospital, testified that he drives to Chattanooga infrequently and then only to THA district meetings, has no business or personal interests in Chattanooga, is not familiar with hospital facilities and locations in Chattanooga, and does not subscribe to either of the Chattanooga newspapers (Tr. 3476–77).

54. *Athens Community Hospital* is a 118-bed full-service hospital located in McMinn County (CX's 15, p. 179, 17Z–46, 54A, G). It is some 40 miles from Chattanooga in Athens, Tennessee, a small town with a population of approximately 12,000 (CX's 54A, 17Z–28). According to the former administrator of Erlanger, while Athens and other outlying hospitals compete with Erlanger "to a degree," patients who need general medical-surgical care are treated in their own communities (Tr. 148) and patients from the Athens Hospital needing special care would probably be referred to Knoxville, Tennessee (Tr. 282). This is also true of Woods Memorial Hospital (Tr. 283). Athens Hospital is not a member of the Chattanooga Area Hospital District (Tr.

283). Two administrators from urban Chattanooga hospitals who testified in this case were not familiar with the services offered by Athens (Tr. 279, 1603).

55. *Bradley County Memorial Hospital* is in Bradley County. Bradley Memorial is a 251-bed city-owned hospital located in Cleveland, Tennessee, approximately 30 miles north of Chattanooga and three miles from Cleveland Community Hospital (Tr. 136, 685, 3465; CX's 15, pp. 142, 179, 49A, F, 148Z–16). It is a full-service community hospital that provides primary and secondary care and some intensive care services (Tr. 136; CX 15, p. 142). It offers a range and quality of services comparable to many of the hospitals in Chattanooga (Tr. 685; CX 148Z–25). It also operates an 18-bed substance abuse treatment unit (CX 65F; HCA's Response to Interrogatory 18, filed Apr. 20, 1983).

56. The other five hospitals in the HSA are relatively small facilities located in rural areas (*see* Tr. 3296).

57. *Woods Memorial Hospital* is a 72-bed county-owned community hospital located in Etowah, Tennessee, approximately 38 miles from Chattanooga (CX's 61A, 17Z–35). Any referrals from Woods Memorial in Etowah would probably go to Knoxville, Tennessee hospitals (Tr. 283). Woods Memorial Hospital is not a [17] member of the Chattanooga area hospital council (Tr. 283), and hospital administrators in the Chattanooga area are not generally familiar with the Woods Memorial facility and services (*e.g.*, Tr. 279).[***]* (RX 1081 (150).

58. *Copper Basin* is a 44-bed county-owned community hospital located east of Chattanooga near the North Carolina border in Polk County (CX 59A, F, 15, pp. 14, 179; *see* Tr. 279). It is located in Cooperville, Tennessee approximately 65 miles from Chattanooga (CX 59A). Hospital administrators in the Chattanooga urban area are not familiar with the facilities, location or services of Copper Basin Medical Center (*e.g.*, Tr. 280).

59. The three remaining hospitals, aside from offering only the most basic treatment, are not JCAH-accredited. They are Bledsoe County Hospital, Grundy County Hospital, and Rhea County Medical Center.

60. *Rhea* is a 57-bed primary care hospital owned and operated by the county (CX's 45A, F, 15, p. 142). It is located in Rhea County approximately 25 miles from Chattanooga. [***] (RX 1081). Hospital administrators in the Chattanooga urban area are generally unfamiliar with Rhea County Medical Center (*e.g.*, Tr. 685).

61. *Bledsoe* is a 32-bed general acute care hospital located in Bledsoe County. It provides primary care services (Tr. 150; CX's 64A, F, 15, p. 179), and is a county-owned facility approximately 35 miles from Chattanooga (CX 48A, F). [***] (RX 1081 (160)).

* Throughout this document, [***] refers to *in camera* material that has been excised.

62. *Grundy County General Hospital* is a 27-bed proprietary hospital located in Grundy County (CX's 651A, 15, p. 179). It is owned by Cumberland Heights Hospital, Inc. (CX 99A). Grundy is a small, primary care facility located approximately 36 miles northwest of Chattanooga (CX 15, p. 142). [***] (RX 1081 (165)). Hospital administrators in the Chattanooga urban area are not familiar with the facilities or services of Grundy County General Hospital (*e.g.*, Tr. 281, 1603). [18]

D. *Other Health Care Facilities In The Chattanooga Area*

63. There are 27 nursing homes in the HSA (CX 15, p. 208), nine of which are located in Hamilton County (CX 15, p. 225).

64. There are two psychiatric hospitals in Chattanooga (CX's 15, pp. 232–33, 131D).

65. At the time of the acquisitions in 1981, there were no emergicenters or independent ambulatory surgicenters in Chattanooga (Tr. 1765–66, 162–64, 167–68, 554–55, 3404, 3340, 468–69).

66. There are currently three free-standing emergicenters in Chattanooga not associated with a hospital (Tr. 469, 554, 3304, 3290, 168).

E. *Interstate Commerce*

67. Prior to the acquisitions of HAI and HCC, HCA owned or managed over 170 acute care and psychiatric hospitals in more than 25 states (CX 535, pp. 18, 20) and in 1980, it had gross revenues of $1.4 billion from its interstate operations (CX's 8V, 13Y).

68. HCA's Parkridge Hospital in Chattanooga, Tennessee treated approximately 2,503 patients from outside of Tennessee, and this activity produced a gross revenue of around $5,230,733 (CX's 36E-G, 497E-G).

69. In 1981, Parkridge received federal Medicare funds of approximately $8.3 million from the United States Treasury in Washington, D.C. (HCA's Response to Interrogatory 28(q), filed Apr. 20, 1983), and in the same year, it purchased approximately $883,000 worth of drugs and supplies from out-of-state (HCA's Response to Interrogatory 28(o), filed Apr. 20, 1983).

70. Prior to being acquired by HCA, HAI owned or managed a total of 155 hospitals in 33 states (CX's 535, p. 3, 272B; Ans. ¶ 7). The headquarters for these interstate operations was Nashville, Tennessee (CX 272A). In 1980, HAI had gross revenues of approximately $573 million from its interstate operations (CX 11Z–17; Ans. ¶ 7).

71. The hospitals owned and managed by HAI in the Chattanooga area, Diagnostic Center Hospital, Downtown General Hospital, Red Bank Community Hospital, Sequatchie General Hospital, and South Pittsburg Municipal Hospital treated approximately 2,304 out-of-state patients, which, based on the ratio of these patients to its total

number of patients, produced gross revenues of approximately $4,878,962 (CX's 16E, G, 23E, G, [19] 30E, G, 37I, M, 67E, G; HCA's Response to Interrogatory 28(m), filed Mar. 10, 1983 and Apr. 20, 1983). In 1981, these hospitals received federal Medicare funds of well over $6 million from the United States Treasury in Washington, D.C. (HCA's Responses to Interrogatory 28(q), filed Mar. 10, 1983 and April 20, 1983). In 1981, Diagnostic, South Pittsburg, and Sequatchie purchased approximately $838,251 worth of drugs and supplies from outside Tennessee (HCA's Responses to Interrogatory 28(o), filed Mar. 10, 1983 and Apr. 20, 1983).

72. Prior to being acquired by HCA, HCC owned or managed two general acute care hospitals, three psychiatric hospitals, an outpatient psychiatric clinic, and psychiatric treatment units at two hospitals owned by others, in four states. These interstate operations were headquartered in Chattanooga, Tennessee (CX's 136D, M, 10D, 136D). In 1980, HCC had revenues of approximately $12 million from these operations (CX 10M; Ans. ¶ 10).

73. In 1981, Medical Park Hospital, HCC's only acute care hospital in the Chattanooga area, treated approximately 409 patients from states other than Tennessee, which, based on the ratio of these patients to its total number of patients, produced gross revenues of approximately $1,027,209 (CX 75E, G), and it received federal Medicare funds of approximately $2.6 million from the United States Treasury in Washington, D.C. (HCA's Response to Interrogatory 28(q), filed Apr. 20, 1983). In 1981, Medical Park purchased approximately $96,804 worth of drugs and supplies from out-of-state (HCA's Response to Interrogatory 28(o), filed Apr. 20, 1983).

74. In some cases, private insurers who provide health insurance for Chattanooga businesses are located in states other than Tennessee (RX's 1001 (2), 1011 (1)), and funds from these insurers that reimburse hospitals in the Chattanooga area for patient care cross state lines.

75. HCA's, HAI's and HCC's total operations at the time of the acquisition were in interstate commerce as were their operations in the Chattanooga area and the acquisitions therefore occurred in, and affected, interstate commerce.

F. *The Relevant Product Market*

1. Acute Care Hospital Services

a. *Expert Opinion*

76. Dr. David S. Salkever, complaint counsel's expert witness, is a professor of health economics at John Hopkins [20] University (Tr. 2264). He testified that the relevant product market in this case should be defined as:

[T]he provision of acute inpatient hospital services and the provision of hospital services to critically ill emergency patients, typically who I suspect would be admitted as inpatients if indeed they survived at the critical episode (Tr. 2280).

77. Dr. Salkever's definition excludes from an acute care hospital's business its outpatient business, except for outpatients who are subsequently admitted (Tr. 2281). The reason for limiting the market to inpatient services provided by acute care hospitals is that these services are typically needed by and consumed by patients in combination (Tr. 2283) and can therefore be offered only by acute care hospitals (Tr. 2284).

78. Dr. Salkever's definition also excludes providers of inpatient services other than acute care hospitals, such as psychiatric hospitals and nursing homes because they provide a different type of service, *i.e.*, longer-term care, and are not equipped to treat patients who need acute care (Tr. 2285). His definition also excludes free standing surgery facilities, emergency centers and doctor's offices, even though they offer some of the services provided by a hospital's outpatient clinics because, if they are included, one would be given "a very misleading picture of the structure of the market for the hospital's principal line of business, namely, inpatient services and care of critically ill emergency patients" (Tr. 2287). Finally, he would exclude from the market the pediatric facilities at T.C. Thompson Children's Hospital primarily because the beds in that facility could not easily be converted to use by adult patients (Tr. 2288).

79. Dr. Jeffrey E. Harris, HCA's expert, is a physician on the staff of Massachusetts General Hospital and is an associate professor of economics at MIT (Tr. 3806). He disagreed with Dr. Salkever's proposed product market because, in his view, it is too narrow (Tr. 3942–43). In his opinion, the product market should include outpatient care (Tr. 3943) because the portion of hospital business devoted to such care has increased over time as a result of advances in medical technology which permit outpatient treatment for conditions which were formerly treated on an inpatient basis (Tr. 3943–44). Another reason for inclusion of outpatient net revenues (his preferred unit of measurement) in the acute care hospital market is that outpatient facilities are frequently a feeder for inpatient facilities (Tr. 3945, 3950–51). Dr. Harris also believes that outpatient providers such as emergicenters and multiple diagnostic services [21] and hospices are competing more and more with acute care hospitals (Tr. 3952–53).

b. *Inpatient Services Offered By Acute Care Hospitals*

80. Representatives of health care providers in the Chattanooga area generally agreed that there is an essential core of services pro-

vided by acute care hospitals. These include medical and surgical beds, 24–hour observation, nursing services, laboratory and x-ray, intensive and coronary care, and ancillary support services (Tr. 93, 463–64, 552, 1396, 1401, 1514, 1762; CX 895E).

81. This range of services must be provided by all acute care hospitals because patient treatment often requires consumption of these services in combination (Tr. 2283), and because hospitalized patients are often unable to travel to another facility for treatment (Tr. 1763). Adding to the need for acute care hospitals to offer a range of services is the variability and uncertainty of illness (Tr. 3856).

c. *State Requirements For Acute Care Hospitals*

82. Under Tennessee law, a general hospital must be able to provide to its patients diagnosis, treatment and care of acute illness, injury, or infirmity for a period exceeding 24 hours, and it must provide an organized staff, a laboratory, x-ray facilities, surgery, obstetrics, an isolation unit, a kitchen, and an emergency department (Tenn. Admin. Comp. ch. 1200–8–1–.02(3); *see also* Tenn. Code Ann. § 68–11–201(j) (1983). The state requires acute care hospitals to offer all the services enumerated in the regulations (Tenn. Admin. Comp. ch. 1200 –8–1–.02(3)); if any of these services are not provided, a waiver of the regulations must be obtained (*see* Tenn. Code Ann. § 68–11–209 (1983); Tr. 3616). The *1981–1986 Health Systems Plan,* which describes the health care system in the Chattanooga area (*see* CX 15, p. 1), also identifies basic acute care hospital services, including, among other things, obstetrics (unless offered elsewhere in the region), surgery, x-ray and laboratory services, blood services, pharmacy, pathology laboratory, respiratory therapy, and intensive care capabilities (CX's 15, p. 141, 169, pp. 181–82; *see also 1983–1986 Tennessee State Health Plan*). To be eligible for accreditation as an acute care hospital by the Joint Commission on Accreditation of Hospitals, an establishment must have facilities, beds, and services available over a continuous period, 24 hours a day, seven days a week; it must have an organized medical staff and nursing service; its primary function must be the diagnosis, treatment, and/or rehabilitation [22] of the acutely ill; and it must provide dietetic, emergency, nuclear medicine, pathology, laboratory, pharmacy, radiology, and respiratory services (CX 174, p. xviii).

83. Chattanooga area acute care hospitals provide all or almost all of the services identified above, as indicated in reports filed with the states of Tennessee and Georgia and the American Hospital Association (CX's 62B-C, 63E, G, I, L (Memorial), 63B-C, 654C-E (East Ridge), 65B-C, 633C-F (Bradley), 66B-C, 638C-F (Erlanger), 67B-C, 24E, G, I (Red Bank), 68B-C, 637E, G, I, K (Metropolitan), 69B-C, 634E, G, I, K

(Woods), 70B-C, 632C-F (Copper Basin), 72B-C, 635E, G, I, K (Rhea), 99B-C (Grundy), 496B-C, 643C-F (Diagnostic),[6] 497B-C, 644C-F (Parkridge), 498B-C, 641E, G, I, K (Downtown), 499B-C (North Park), 500B-C, 640C-F (Sequatchie), 501B-C, 642E, G, I, K (South Pittsburg), 502B-C, 645B-D (Athens), 503B-C, 639E, G, I, K (Cleveland Community), 657F, H, 106C-F (Tri-County)).

d. *Industry Recognition Of Acute Care Hospitals As Distinct From Other Providers*

84. The state of Tennessee licenses "general hospitals" separately from specialty health care facilities such as psychiatric hospitals (Tenn. Admin. Comp. ch. 1200–8–1–.02(3)), as does the state of Georgia (Ga. Admin. Comp. ch. 290–5–6–.03(3)). Acute care hospitals are treated separately from other health care facilities in the *Health Systems Plan* (CX 15, pp. 137–90), and the Tennessee and Georgia state health plans devote separate chapters to acute care hospitals (CX's 169, pp. 179–277, 288, pp. 414–47). General medical and surgical (*i.e.*, acute care) hospitals have a separate Standard Industrial Classification ("SIC") code (8062) from other health care facilities (OMB *Standard Industrial Classification Manual* ("1972 SIC Manual") (1972).

85. The Joint Commission on Accreditation of Hospitals has a separate set of eligibility criteria for acute care hospitals as distinguished from specialty or long-term facilities (Tr. 2284; CX 174, p. xviii) and the American Hospital Association has separate classifications for acute care psychiatric hospitals and nursing homes (Tr. 2285).

86. Hospital administrators also regard the services provided by acute care hospitals as distinct from those of other facilities (Tr. 93, 1514, 3339). Health economists, as reflected in studies and other health economics literature, perceive acute [**23**] care hospitals as different from other health care providers such as psychiatric hospitals and nursing homes (Tr. 2285–86).

87. When they discuss competition in their planning documents, Chattanooga area acute care hospitals list only other acute care hospitals (CX's 17Z–35 through Z–37 (Athens), 18Z–43 through Z–44, 38Z–39 through Z–43 (Parkridge), 20Z–26 through Z–27 (North Park), 28Z–15 (Downtown), 32Z–40 through Z–45, 29Z–5 through Z–7 (Diagnostic), 34E–F, 157Z–4 through Z–5 (Sequatchie) 82Z–19 (South Pittsburg), 235Z–23, 148Z–25 through Z–26 (Cleveland Community), 611Z–55 (East Ridge).

88. Although some Chattanooga area hospital administrators perceive competition from other health care providers, it is limited (Tr. 168, 769, 1517, 3287, 3340, 3402–03, 3475, 3492–94). Their only signifi-

[6] Diagnostic does not, however, have an operating room or other surgical facilities (Tr. 3593).

cant competition comes from other acute care hospitals (Tr. 135, 553, 683–84, 687, 1100, 1505).

89. Chattanooga area acute care hospitals, when they compare prices, do so only with those of other acute care hospitals (CX's 161A, 162A (South Pittsburg), 179A, 180A, 181A, 182A, 183A, 283A, 284B (Diagnostic), 184A, 271A, 273A, 274A, 275B (Downtown), 239A-D (HAI), 276A-E, 277B-D (Parkridge), 279A, 280A, 281A, 282A (Sequatchie), 286A, 287A (Red Bank), 315N, 316I, 317E (Erlanger)). The management contracts for Downtown and Red Bank require the rates at "comparable hospitals nearby" to be considered when rates are set (CX's 185E, 189D).

2. Other Health Care Providers And Services

a. *Hospital Outpatient Care*

90. Nationally, hospital outpatient care represents 12% of their gross revenues (Tr. 2286) and outpatient care in Chattanooga area hospitals is being expanded by area administrators (Tr. 766).

91. Outpatient care such as day surgery, emergency care and diagnosis are Parkridge Hospital's most rapidly growing segment of services and it plans to increase its day surgery facilities (Tr. 3278); Tri-County has expanded its emergency care facility in LaFayette, Georgia (RX 677 (1)) and opened a new day surgery unit in February 1983 (RX 682 (4)).

92. The installation of new CT scanning equipment at Tri-County in April 1982 and at Parkridge Hospital in 1981, substantially expanded the outpatient diagnostic capabilities of those two hospitals (Tr. 3276; RX's 683 (4), 682 (4), 1120). The outpatient capabilities at Parkridge Hospital have also been increased by the significant expansion of nuclear medicine and cardiology services since 1981 (Tr. 3276). [24]

93. The revenue contribution to East Ridge Community Hospital from outpatient services is significant and growing (Tr. 767). A renovation program in progress at East Ridge in 1983 involved the expansion and renovation of the emergency treatment area and all the ancillary departments of the hospital, and was prompted in part by the increasing volume of outpatient care (Tr. 768).

94. Outpatient care, a rapidly growing area for the new hospital, accounts for approximately 12% of hospital revenues at North Park (Tr. 3400).

95. There are several reasons for increased outpatient treatment: Unlike the past, third-party payers in the Chattanooga area now provide incentives, such as lower or no deductible or co-payments (F. 243; Tr. 981–82, 1509, 1809, 3949) which encourage providers to in-

crease ambulatory surgery and other outpatient care (Tr. 465). In addition, advances in medical technology have diminished the distinction between inpatient and outpatient care (Tr. 465, 501–03, 3943–44), and diagnostic testing and surgical work-ups formerly done after hospital admission are now being done on a pre-admission outpatient basis to shorten hospital stays (Tr. 504, 1571, 3948; CX 15, pp. 145–46).

96. Estimates in the professional literature suggest that 25% or more of hospital surgical procedures can be performed on an outpatient basis (Tr. 504), and a study commissioned by Erlanger Medical Center, where 12 to 15% of surgery is outpatient, claims that this figure could be increased to 25 to 30% (Tr. 166). Some area hospitals have experienced an increase in the percent of outpatient surgery which they perform (Tr. 1522, 1569, 3279, 3398, 3466–67, 3504).

b. *Other Providers*

(1) Inpatient Care

97. In Chattanooga, the only inpatient health care facilities other than acute care hospitals are nursing homes and psychiatric hospitals.

98. Nursing homes provide long-term services to "chronically ill or seriously disabled persons over an extended period of time" (CX 169, p. 278; Tr. 3337). The average length of stay at nursing homes in the Chattanooga area is 374.8 days (CX 15, p. 226), as compared with a 6.1–day average length of stay at acute care hospitals (CX 15, p. 182). [25]

99. Tennessee and Georgia law treat nursing homes differently from acute care hospitals (Tenn. Code Ann. § 68–11–201(l) (1983); Ga. Admin. Comp. ch. 290–5–6–.21), and they are treated differently by the federal government for purposes of Medicare reimbursement (42 U.S.C.A. §§ 1395d–1395f (West 1983). Both the Tennessee and Georgia state health plans (CX 169, pp. 278–91, 288, pp. 334–84) and the *Health Systems Plan* (CX 15, pp. 207–30) have separate sections discussing long-term facilities, the majority of which are nursing homes (CX 169, p. 282). When considering certificate-of-need applications, nursing home beds are considered separately from acute care beds by the Tennessee Health Facilities Commission (Tr. 484) and the Georgia State Health Planning and Development Authority (Ga. Admin. Comp. ch. 272–2–.09(8)–(9)). The health care industry also regards long-term care facilities like nursing homes as distinct from acute care hospitals (CX 174, p. xx; Tr. 159–60, 1514–15, 2285).

100. The services provided by nursing homes are different from those provided by acute care hospitals. They do not have the facilities, such as laboratory and radiology services, pharmacy services, and

nursing services, to handle acutely ill patients (Tr. 160, 471, 553–54, 1400, 1761–62) and they cannot diagnose or treat ailments or follow up on their diagnosis and treatment (Tr. 1762).

101. If it decided to offer the same services as an acute care hospital, a nursing home would have to purchase new equipment, hire a new staff and overcome the regulatory hurdles imposed by Tennessee and Georgia certificate-of-need laws (F. 252–77).

102. There are several inpatient mental health facilities in the Chattanooga area, including two free-standing hospitals (HCA's Valley Hospital and the state institute, Moccasion Bend) and four units in acute care hospitals (Erlanger (13 beds), Tri-County (15 beds), Cleveland Community (20 beds)) (CX 15, p. 268), and Bradley's substance abuse treatment unit (18 beds) (CX 15, p. 256)).

103. Mental Health, or psychiatric, hospitals are generally recognized as distinct entities from acute care hospitals. Tennessee and Georgia have separate licensing classifications and requirements for psychiatric facilities (Tenn. Admin. Comp. ch. 1200–8–1–.02(6); Ga. Admin. Comp. ch. 290–5–6–.19). The Tennessee and Georgia state health plans have separate sections for mental health services (CX's 169, pp. 292–315, 288, pp. 164–204) as does the *Health Systems Plan* (CX 15, pp. 231–68). In addition, there is a separate *Mental Health Systems Plan* for the Georgia-Tennessee Regional Health Commission (CX 15, p. 231). Psychiatric beds are considered separately from acute care beds for purposes of decisions on certificate-of-need applications (Tr. 484; Ga. Admin. Comp. ch. 272–2–.09(8)(b)). The health care industry also views psychiatric hospitals as distinct from acute **[26]** care hospitals (Tr. 2285–86). The Joint Commission on Accreditation of Hospitals has separate standards for psychiatric hospitals (CX 174, p. xx), and acute care hospital administrators do not view psychiatric hospitals as competitors (Tr. 159, 1505, 1964). Psychiatric hospitals have a separate SIC code (8063) from other health care facilities (*1972 SIC Manual*).

104. Providers of psychiatric services offer different types of treatment from that which is available at acute care hospitals. Psychiatric treatment programs provide counseling and psychiatric therapy (for example, behavior modification, transactional analysis, and psychoanalysis), rather than treatment of physical ailments such as strokes or heart attacks (HCA's Response to Interrogatory 18(d), filed Apr. 20, 1984; Tr. 159, 472, 1761, 3468). Psychiatric hospitals have specially trained personnel, such as social workers, psychiatric nurses, clinical psychologists, and psychiatric aides and technicians (HCA's Response to Interrogatory 18(e), filed Apr. 20, 1983; Tr. 3491), and they do not have the x-ray equipment, the laboratories, or the personnel neces-

sary for diagnosis and treatment of acutely ill patients (Tr. 158, 472, 1761, 3470, 3491).

105. Before they could offer the services of an acute care hospital, psychiatric hospitals would have to purchase new equipment and hire qualified personnel. They would also have to meet state licensing and certificate-of-need requirements (Tenn. Code Ann. §§ 68–11–103(5), (11), –106(g) (Supp. 1983), *as amended* by THPRDA Amendments of 1984; Ga. Code Ann. §§ 31–6–(12), –40(b)).

106. While conversion of a psychiatric hospital to an acute care hospital would be a major undertaking, the psychiatric facilities in Chattanooga area acute care hospitals could easily be converted to other uses, although some personnel changes would also have to be made (Tr. 120, 3469–71).

107. The beds in the psychiatric unit at Erlanger Medical Center are included within the hospital's approved and licensed bed complement for medical/surgical services and are not used for long-term psychiatric care. Patients using these beds receive medical/surgical and nursing care services (Tr. 345) and the beds could be used for non-psychiatric patients (Tr. 120).

108. A psychiatric treatment unit for short-term acute care patients was opened at Cleveland Community Hospital in Cleveland, Tennessee in October 1981 (Tr. 3468). Renovation of a medical/surgical nursing unit for psychiatric care was completed at a cost of approximately $70,000 (Tr. 3469). The only difference between the psychiatric patient rooms and other patient rooms at Cleveland Community are the absence of television and telephone (Tr. 3469), and conversion of the former to medical/surgical rooms would only require reassignment of staff (Tr. 3470). [27]

109. The psychiatric care offered at Erlanger, Tri-County, Cleveland Community and Bradley Hospitals is not comparable to that offered at the two psychiatric hospitals in Chattanooga (Tr. 159, 3469); while these services are specialized, they are similar to services which are provided, or which could be provided, by other acute care hospitals in the area. For example, Parkridge and East Ridge treat patients with psychiatric problems or disorders in rooms used for medical/surgical care (Tr. 815, 3284–85; *see also* Tr. 422).

(2) Outpatient Care

110. Although physicians may perform some minor procedures in their offices which could also be done in an acute care hospital, their activities are completely different from those of hospitals (Tr. 4213). Recently, however, outpatient facilities have been opened which offer some of the same services as do the outpatient facilities of acute care hospitals.

111. For example, three emergicenters have been built in the Chattanooga area since the HAI and HCC acquisitions (Tr. 3290). An emergicenter is a convenience medical center, geared towards "medical problems normally treated by a family doctor," but which is open for longer hours than most physicians' offices (CX 815; *see* Tr. 469, 554). Centra Care, which operates two of the Chattanooga centers, describes its centers as "a doctor's office where you and your family can receive prompt medical treatment" (CX's 816B, 821). The types of ailments treated by emergicenters include, among other things, colds, cuts, ear infections, pulled muscles, stomach aches, coughing, and childhood illnesses (CX's 815, 816B, 821). Emergicenters also provide care for emergencies "which [do not] require back-up services from a hospital emergency room" (CX's 816B, 821).

112. Emergicenters are not equipped to handle truly ill patients or serious emergencies. They do not have the back-up services of a hospital (CX's 816B, 821; Tr. 470, 1398), nor do they have on hand the kind of equipment usually available in hospital emergency rooms such as special monitors, life-saving equipment, equipment for taking care of major trauma, special catheters, and other items used to monitor very sick individuals (Tr. 470).

113. Since the HAI and HCC acquisitions, there have been proposals to construct an outpatient diagnostic center and a free-standing ambulatory surgicenter in Chattanooga (Tr. 469, 1766). Since these are only proposals, they have no present effect on the health care product mix in Chattanooga, but if one were to speculate on their future effect if they were built, one would have to conclude that they will not offer the same mix of [28] services as are offered by acute care hospitals (Tr. 1398, 1401–02, 1765–67).

c. *Pediatric Services*

114. There are four hospitals in the Chattanooga area that provide pediatric services. Two are acute care hospitals with pediatric units: Bradley Memorial and Tri-County Hospitals. The other two are Metropolitan Hospital and T.C. Thompson Children's Hospital at the Erlanger Medical Center (CX 15, p. 186).

115. The pediatric unit at Bradley has 14 beds and the unit at Tri-County has 20 (CX 15, p. 186), but the services provided at those units are not as specialized as those provided by pediatric hospitals. They are not equipped to handle more serious illnesses or injuries (Tr. 455–56), and they do not have separate facilities such as operating rooms or laboratories (Tr. 107).

116. Metropolitan Hospital is a 64–bed hospital that treats primarily pediatric patients. It was formerly owned by the Tepper group, a group of physicians—mostly pediatricians—who comprise the hospi-

tal's medical staff. Although Metropolitan does treat some adult patients, primarily due to its developing diabetes program, it remains for the most part a pediatric hospital (Tr. 1089–91).

117. Metropolitan provides general pediatric services, but little, if any, intensive care. Patients with serious problems are transferred to T.C. Thompson Children's Hospital (Tr. 105). Metropolitan does have some of the equipment for handling small children, but it is not as specialized as T.C. Thompson Children's Hospital (Tr. 456).

118. T.C. Thompson Children's Hospital, a 114–bed hospital located on the Erlanger Medical Center campus, is a highly specialized pediatric facility. Children's Hospital was an independent hospital until 1975 when it was moved to Erlanger (Tr. 96–97). Children's Hospital provides only pediatric services; it has a separate admitting office, emergency room, operating suites, laboratory services, radiology services, nursing care areas, and intensive care areas (Tr. 97, 104). Most of its patients are under six years old (Tr. 457).

119. Complaint counsel claim that the treatment of pediatric patients is different from that of adults (CPF VI 46–47) and that pediatric services are generally recognized as distinct from adult acute care services (CPF VI 48–50). If true, such distinctions might support elimination of all acute care beds dedicated to pediatric services from consideration as part of the product market for health care in the Chattanooga area, but complaint counsel are much more selective; they argue that [29] while the pediatric beds at Bradley, Tri-County and Metropolitan should be considered equivalent to surgical-medical beds in acute care hospitals for purposes of computing market share, those at T.C. Thompson should be excluded (CB, pp. 20–22).

120. T.C. Thompson pediatrics beds should be so treated because, according to complaint counsel, they cannot easily be converted to adult use. As support for their claim, they cite the testimony of Mr. Lamb, Erlanger's former administrator, who stated that such conversion "would require major renovation, virtually gutting the entire area. . . ." (Tr. 103). They also argue that if Children's Hospital were to discontinue providing pediatric services, a certificate of need would be required (Tenn. Code Ann. § 68–11–106(g)(1)(E) (Supp. 1983); Tenn. Admin. Comp. ch. 0720–2–02(2) (c) (13)).

121. With the use of additional instrumentation, the operating room at T.C. Thompson could be used for adult surgery (Tr. 101–02), but Mr. Lamb denied on cross-examination that adults could be accommodated in the patient rooms even if adult furniture were placed in them (Tr. 399–400).

122. Some of the pediatric rooms at T.C. Thompson are three-bed wards, and some are semi-private (two beds to a room), but well over half are private (Tr. 297–98). There is no reason why three-bed or

two-bed rooms could not be converted to adult usage; however, although he conceded that "square foot wise" (Tr. 400) an adult bed could be placed in a private room without violating state requirements,[7] Mr. Lamb claimed that he would not "of choice" put a bed where it would have to be placed in the room, *i.e.*, with the patient facing the door (Tr. 400).

123. Mr. Lamb's claim is based upon preference rather than physical limitations, and his preference seems not to be shared by other administrators since some of the patient rooms at Southern Hills Hospital, a new and very modern suburban hospital opened in Nashville, Tennessee in 1979, are designed so that the foot of the patient's bed is pointed in the direction of the door to the room (Tr. 3397).

124. Furthermore, the recent renovation of pediatric facilities at Erlanger suggests that even if the existing pediatric facilities could not be used for adult care, the [**30**] conversion of these facilities to adult care could be accomplished without undue difficulty or expense. Following initial completion of the pediatric units at the Erlanger Medical Center, a pediatric intensive care unit was established by removing one partition between two-patient rooms and making a four-bed intensive care unit. Bathroom space in the original patient rooms was converted to storage space for the intensive care area (Tr. 309). Further pediatric intensive care unit renovation was in progress in 1983. This renovation involved expanding the area and adding to the number of intensive care beds (Tr. 303–04). The remodeling and expansion is expected to cost less than a million dollars (Tr. 333). The renovation includes changing the service areas in the center of the pediatric floor. Hallway walls of the patient rooms are being relocated as part of this renovation (Tr. 310–11).

125. If T.C. Thompson's facilities were unavailable, only a very small percentage of the patients hospitalized by Robert C. Coddington, M.D., a Chattanooga area pediatrician practicing almost exclusively at Erlanger Medical Center (Tr. 489), would have to be hospitalized in specialty hospitals outside of the Chattanooga area rather than in another Chattanooga hospital (Tr. 507–08).

126. Most acute care hospitals could care for a younger patient needing traction for an upper leg fracture (Tr. 512). Most hospitals do tonsillectomies and most general acute care hospitals have facilities where an appendectomy could be performed on a six-year-old child (Tr. 495–96).

127. Other area hospitals offer pediatric acute care. In 1981, John L. Hutcheson, Tri-County Hospital, was operating a 20–bed pediatric

[7] The rooms measure 10 feet by 14 feet, or 140 square feet (excluding the private bathroom and adjoining alcove) (Tr. 315; RX 977). The State of Tennessee requires only 100 square feet for a private hospital room, with 3 feet of clearance around the sides and foot of the bed, which is administratively defined to be 3 feet by 7 feet 6 inches (Tr. 395). A bed of this size can easily be placed in a 10 foot by 14 foot room with the requisite clearance.

unit (CX 106H). Bradley Memorial Hospital was operating a 14–bed pediatric unit in 1981 (CX 65F). Tri-County and Bradley Memorial have operating rooms, and emergency and laboratory facilities dedicated to pediatrics (Tr. 107).

128. Parkridge Hospital does not have a specialized pediatric unit, but has seven pediatricians on its medical staff with active admitting privileges and one with consulting privileges (Tr. 3343). There are also surgeons on the medical staff at Parkridge who received patient referrals from pediatricians, particularly in orthopedic surgery, general surgery, ear, nose and throat surgery and oral surgery (Tr. 3281). Parkridge has special equipment and supplies available for use with small children, including special instruments in surgery, special endoscopes in diagnostic departments, and special equipment in the emergency center (Tr. 3282). Parkridge would not need any additional facilities in order to accommodate the hospital work of an active group of pediatricians. In order to establish a pediatrics unit, Parkridge would make some cosmetic changes in some of the room decor and could be in a position to handle a substantial volume of pediatric work within a couple of months (Tr. 3283). Some of [31] the current nursing staff at Parkridge have training and experience in pediatrics and could be transferred to a specialized pediatric unit on relatively short notice (Tr. 3284).

129. North Park Hospital provides pediatric care including tonsillectomies, laryngotomies and general surgery such as appendectomies and hernia repairs (Tr. 3400).

130. East Ridge Community Hospital does pediatric work associated with its obstetrics practice and nursery, and also does tonsillectomies, appendectomies and accident-related pediatric care through the emergency room (Tr. 805). Twenty to thirty pediatricians are on the staff at East Ridge Community Hospital, but most pediatric admissions are through family practices or the newborn nursery (Tr. 806).

131. Cleveland Community Hospital in Cleveland, Tennessee does not have a pediatric unit but does treat children, and there are pediatricians on the staff of the hospital. Pediatric admissions are also made at the hospital by general practitioners or family practice physicians. The hospital provides medical devices and cribs for pediatric patients (Tr. 3467).

132. Metropolitan Hospital (formerly Tepper Hospital) provides specialized pediatric care. Most of the admissions by the Tepper Group, a major pediatric practice in Chattanooga, are made to Metropolitan Hospital (Tr. 146).

133. Pediatric discharges from some of the hospitals in the Chattanooga urban area without specialized pediatric units in 1981 included 44 discharges from Red Bank Community Hospital (CX 67G), 100

discharges from East Ridge Community Hospital (CX 63G), 314 from Parkridge (CX 36G), and 538 discharges from Memorial (CX 62G).

3. Conclusion

134. I agree with HCA that non-hospital providers such as diagnostic and emergency care centers, and other providers such as doctors' offices, offer some of the same services as do acute care hospitals (RPF 287), and I agree that the relevant product market must encompass "all services provided by acute care hospitals and those services offered by non-hospital providers which are an alternative to hospital care" (RPF 359); however, while individual services offered by an acute care hospital may be identical to ones offered by non-hospital providers, the latter are not an alternative to the kind of care which only acute care hospitals can provide: the unique combination of services which the acute care patient needs (F. 77, 80–81). For [32] that reason, I find that the relevant product market consists of the cluster of services offered by acute care hospitals, and that the best measure of the extent of those services includes outpatient as well as inpatient care, since acute care hospitals compete with each other in offering both kinds of care (F. 90–96) and since, as both Dr. Salkever and Dr. Harris agree, acute care outpatient facilities feed patients to the inpatient facilities (F. 76–79).

135. Including outpatient care in the acute care hospital market is not inconsistent with the position that outpatient facilities such as doctors' offices and emergicenters do not compete with acute care hospitals, for outpatient care offered by acute care hospitals is an inseparable part of the cluster of services which they offer. In any event, HCA concedes that, even if it could be quantified, the volume of services offered by non-hospital providers at the time of the acquisitions would not greatly affect the market positions of its owned and acquired hospitals (RB, p. 37).

136. Acute care hospitals cater to a different type of patient than do psychiatric hospitals (F. 104), but there is no sound reason why beds devoted to short-term psychiatric care in acute care hospitals should be viewed differently than regular medical/surgical beds in acute care hospitals (F. 106–09); therefore, revenues of psychiatric facilities in acute care hospitals should be counted along with the revenues generated by medical/surgical beds in such hospitals.

137. I also reject complaint counsel's elaborate attempt to carve out an exception to their "cluster of services" concept so that the 114 beds at T.C. Thompson can be excluded from the acute care hospital market. The simplest rejoinder to their claim is that T.C. Thompson competes with the pediatric facilities of other area acute care hospitals (F.

126–33).[8] Since those facilities' beds are included in complaint counsel's acute care hospital market, so should T.C. Thompson's. Furthermore, I reject the claim that T.C. Thompson's pediatric beds could not be converted to adult beds, since T.C. Thompson's physical plant has been changed in the past (F. 124), and there is no legal impediment to the conversion of pediatric private rooms to adult rooms if pediatric services are not entirely eliminated (Tr. 305). [33]

138. Because psychiatric hospitals and nursing homes offer a different group of services to a different clientele, the long-term patient (F. 100, 104), they do not compete with acute care hospitals and should not be included in the acute care hospital market.

G. *The Relevant Geographic Market*

1. Expert Opinion

139. Dr. Salkever defined the relevant geographic market in this case as the:

> [A]rea within which patients view alternative providers as potential substitutes, and an area within which these alternative providers, that is, different hospitals in this case are competing with one another for the same groups of patients (Tr. 2295).

140. Dr. Salkever determined this area by applying the Elzinga-Hogarty test to patient flow data which reveals to which hospitals patients, as a practical matter, can turn for care. If patients in a particular area make substantial use of hospitals outside the area, that implies that hospitals outside the area could act as a check on the exercise of market power by hospitals inside the area (Tr. 2518–19); if a substantial number of patients from outside the area travel into an area for hospitalization, that indicates that hospitals located in the areas where those patients reside could act as a check on the exercise of market power by hospitals inside the area (Tr. 2521–25).

141. The well-known and respected Elzinga-Hogarty test is based on LIFO ("little in from outside") and LOFI ("little out from inside") statistics.[9] A LIFO statistic signifies the percentage of hospital patients from a particular area who remain in the area for hospital services (rather than use hospitals outside the area) (*see* CX 800A). A LOFI statistic signifies the percentage of patients in an area's hospitals who reside in the [34] area (rather than outside the area). Under the test as applied to hospital markets, if few patients leave an area

[8] T.C. Thompson does provide specialized services for its patients (Tr. 100–02, 448–49) and has a staff which is specially trained to treat children (Tr. 100, 452–54), but Erlanger (and presumably other hospitals) offers special care in an eye center and a tumor center whose beds complaint counsel would not exclude from the acute care market (Tr. 107, 421, 490–91).

[9] *See* Elzinga-Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits*, 18 Antitrust Bull. 45 (1973); Elzinga-Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 Antitrust Bull. 1 (1978) ("Elzinga-Hogarty (1978)").

and few patients enter an area to obtain hospital services, that is strong evidence that the area constitutes a relevant geographic market. Dr. Salkever testified that to determine the boundaries of a market, one begins with the particular geographic area in which the principal facilities involved in the merger are located; if the LIFO and LOFI statistics for the area are not sufficiently high, the area under consideration is expanded until the LIFO and LOFI statistics are high enough so that the percentages of "imports" and "exports" are no longer substantial (Tr. 2304–05, 2504–05). If both LIFO and LOFI statistics (or the average of the two) exceed 90%, the Elzinga-Hogarty test for a "strong market" is satisfied. If the standards for a "strong market" are not satisfied, and both LIFO and LOFI statistics exceed 75%, the market is a "weak market" (Elzinga & Hogarty (1978) at 2).

142. Of the possible relevant geographic markets in the Chattanooga area, Dr. Salkever first considered Hamilton County, where most hospital beds, including those of HCA, HCC and HAI, are located; he observed, however, that while many patients living in the county use Hamilton County hospitals, hospitals in the county draw roughly one-third of their patients from outside the county, suggesting that it could not by itself be considered the relevant geographic market (Tr. 2300). Furthermore, while he recognized that the HSA was used by health authorities for planning purposes, patient flow data also suggested "that the HSA was not an appropriate area" (Tr. 2300).

143. Dr. Salkever concluded that, in his judgment, the "best" relevant geographic market using the Elzinga-Hogarty test was the MSA plus Bradley County, although he stated that there might be some justification for viewing either the MSA or the HSA as relevant geographic markets if someone insisted on it (Tr. 2307).

144. It is readily apparent that deciding whether LOFI and LIFO percentages are acceptably high and what weight they are to be given is a matter of judgment (Tr. 2298), for complaint counsel propose different relevant geographic markets than the one suggested by Dr. Salkever.

145. Dr. Harris, HCA's expert, rejected all of the markets proposed by Dr. Salkever and complaint counsel and testified that the correct market—the area in which physicians, the buyers with real decision-making power, have a choice of acute care hospitals to which to admit their patients—in this case is Hamilton County, Tennessee and Walker, Dade, and Catoosa counties in Georgia ("the Chattanooga urban area") (Tr. 3959).

146. Dr. Harris based his conclusion on an analysis of two factors, physician utilization and patient origin. [35]

2. Physician Utilization

147. Dr. Harris testified that whether hospitals occupy the same relevant geographic market is determined, to a great extent, by physician admitting practice, for physician preference, rather than patient choice, decides what hospitals will be used because "for the great majority of people we're talking about in a health care market like Chattanooga, you pick your doctor and then your doctor is the one who's going to decide where you're admitted" (Tr. 3965).

148. After reviewing RX 1081 (1)–(169), which lists, for each hospital in the Chattanooga area, the physicians by specialty who admitted to the hospital, and the number of inpatient days that each physician was responsible for in all of the hospitals in the area (Tr. 3961), Dr. Harris found that, with few exceptions, every physician who admitted to Erlanger admitted exclusively to the hospitals in the urban Chattanooga area, and concluded that this pattern was true of other downtown or urban Chattanooga area hospitals (Tr. 3961–63).

149. An appraisal of RX 1081 and testimony by Chattanooga-area physicians and administrators supports Dr. Harris' conclusion. There is general agreement that physicians play a primary role in determining where their patients are admitted (Tr. 366–67, 488, 785, 1147, 1378–80, 1629) and that physicians in Chattanooga limit their practice to one, two or at most three hospitals within a limited area (Tr. 499, 1549, 1755). The hospitals within a limited area (Tr. 499, 1549, 1755). The medical staff affiliations held by a few Chattanooga physicians at hospitals outside of the Chattanooga urban area are limited to consulting or courtesy privileges (CX 892). As a rule, those few Chattanooga physicians who do have consulting or courtesy privileges at outlying hospitals do not actively practice at the outlying hospitals (RX 1114).

150. [***] (RX 1081). [***] (RX 1081 (4, 7, 14, 15)). [***] (RX 1081 (7, 14)).

151. [***] (RX 1081 (27–42)). [36]

152. Approximately 350 physicians are on the staff at Parkridge Hospital (Tr. 3276). They have their offices in the Chattanooga urban area and admit and treat patients at one or more of the urban area hospitals in addition to Parkridge (Tr. 3277). [***] (RX 1081 (43–57)).

153. [***] (RX 1081 (58–63)).

154. [***] 1981 (RX 1081 (68–72)).

155. Three internists and one surgeon who comprise the Newell Clinic Group account for 90 to 95% of the admissions at Downtown General Hospital (Tr. 3671). [***] (RX 1081 (88–89)).

156. [***] (RX 1081 (94–95)).

157. [***] (RX 1081 (88, 94)). Similarly, the Diagnostic Center Group,

which founded Diagnostic Center Hospital adjacent to the medical group's offices, accounts for all admissions to Diagnostic (Tr. 3593; RX 1081 (83)).

158. [***] (RX 1081 (117–19)).

159. Physicians on the medical staff at Cleveland Community are not on the staff at any hospitals in the Chattanooga urban area (Tr. 3465). [***] [37] (RX 1081 (128–29)).[***] (RX 1081 (129)).

160. [***] (CX 82Z–9, Z–18).[***] (RX 1081 (123)).

161. [***] (RX 1081 (134)).

162. The two physicians with admitting privileges at Whitwell Community Hospital in 1982 did not have privileges at any hospitals in the Chattanooga urban area (CX 892).

3. Patient Origin

163. Patients admitted to Chattanooga urban area hospitals who live outside of the Chattanooga urban area are, with few exceptions, in need of specialized care and treatment not available in their own communities (Tr. 148, 1605, 3277, 3344, 3968).

164. Approximately 60% of the admissions to Erlanger Medical Center comes from Hamilton County with the remainder primarily from six of the several counties contiguous with Hamilton County (Tr. 120; RX 761 (63)).

165. A number of patients from northwest Georgia, northeast Alabama, western North Carolina and from Tennessee counties within a 50 to 75 mile radius of Chattanooga are referred to the Erlanger medical staff for tertiary or specialty care (Tr. 120–22).

166. [***] (RX 273 (9)). Patients admitted to Memorial who live outside of Hamilton County come mostly through referrals between physicians (Tr. 1605). Memorial Hospital admits cardiology referrals from Dalton, Georgia and neurological referrals from Bradley County, Tennessee (Tr. 1504–05).

167. The vast majority of patients admitted to Parkridge Hospital come from within the Chattanooga urban area, the practice area for the Parkridge medical staff. Some patients from outside the urban area are referred to physicians on the Parkridge medical staff for services not available in the outlying communities (Tr. 3277, 3344). [38]

168. Approximately 85% of the patients admitted to Tri-County reside within the three suburban Georgia counties near Chattanooga (RX 361 (17)). Over 50% of the people residing in the three suburban Georgia counties who are hospitalized are admitted to hospitals in Hamilton County, Tennessee (RX 361 (82)).

169. Most of the patients admitted to East Ridge reside in the communities situated in the southeast portion of Hamilton County

adjacent to I–24 and I–75 and from the Georgia communities across the state line along Interstate 75 (Tr. 756–57). Patients admitted to East Ridge from areas beyond the Chattanooga urban area are usually coming to the hospital on a referral basis (Tr. 683).

170. The patients admitted to Downtown General come primarily from the downtown Chattanooga neighborhoods surrounding the hospital (Tr. 3673).

171. [***] (CX 34E; *see* CX 15, p. 14).

172. The primary service area for Whitwell Community Hospital is comprised of limited portions of Marion and Grundy Counties in Tennessee (CX 404Z–70, Z–79, Z–80). Whitwell is the only hospital within a reasonable driving time for persons in this area and is not viewed by its patients as being in competition with any other hospital (CX 404Q).

173. The few residents of counties such as Marion and Sequatchie who are patients in Chattanooga hospitals, according to county-of-origin data, may simply live near the county line (Tr. 3969, 4197).

174. The Census Bureau reported that in 1980, 106,843 persons living in Hamilton County worked in Hamilton County, and 18,866 residents of the suburban Georgia counties of Dade, Walker and Catoosa worked in Hamilton County (CX 822L, T, Z–16; RX 1112 (3)).

175. In contrast, only 848 persons residing in Sequatchie County reported their place of work in Hamilton County, as did 832 residents of Rhea County, 2,493 residents of Marion County, and 1,750 residents of Bradley County (CX 882Z–3, Z–23, Z–29, Z–34; RX 1112 (3)).

4. Hospital Administrators' Testimony

176. Chattanooga urban area hospital administrators do not view outlying community hospitals as competitors (Tr. 3597–98, [39] 3288), and administrators of the outlying rural and community hospitals do not view the Chattanooga urban area hospitals as competitors (Tr. 3475, 617–18; CX's 82Z–19, 404Q, 17Z–35).

177. Cleveland Community Hospital identifies as its competitors only Bradley County Memorial Hospital, Athens Community Hospital, Woods Memorial Hospital and Rhea County Medical Center (Tr. 2532; CX 235Z–11; *see also* Tr. 3475).

178. [***] (CX 82Z–14), [***] (Tr. 2535; CX 82Z–19).

179. Sequatchie General Hospital identifies only Bledsoe County, Whitwell and South Pittsburg as competitors (Tr. 2529–30; CX 34E-F; *see also* Tr. 620).

180. Whitwell Hospital identifies no competitors, but states that patients needing more specialized care than is available in Whitwell go to Chattanooga (Tr. 2535; CX 404Q).

5. Conclusion

181. Although they prefer use of the Chattanooga MSA, complaint counsel suggest that market concentration can be measured in a smaller area, Hamilton County, and a much larger area, the HSA. They do not express much enthusiasm about the market chosen by their expert, Dr. Salkever (the MSA plus Bradley County) or by Dr. Harris (Hamilton County plus Dade, Walker, and Catoosa Counties in Georgia) (CPF VII 3).

182. Although Hamilton County has the largest population and the greatest concentration of hospitals in the area, neither Dr. Salkever nor Dr. Harris viewed it as a satisfactory geographic market. Hamilton County (or any other larger geographic area) does satisfy the LIFO standard of the Elzinga-Hogarty test but, with a LOFI value of some 68%, not that standard because about one-third of the patients who use Hamilton County hospitals come from outside that county (F. 142). The LIFO/LOFI calculations for the five geographic areas analyzed by complaint counsel and HCA are: [40]

	LIFO	LOFI
Hamilton County	98.3%	67.7%
Chattanooga Urban Area	98.3%	78.1%
Chattanooga MSA	98.4%	81.2%
Chattanooga MSA and Bradley County	98.8%	82.7%
Georgia-Tennessee Health Services Area	94.8%	88.0%

(RX 1087).

183. The Chattanooga Urban Area, the MSA, the MSA plus Bradley County and the HSA all satisfy the Elzinga-Hogarty test. Neither of the experts viewed the HSA as a realistic market, and my analysis of physician referral patterns and testimony of knowledgeable Chattanooga area hospital officials convinces me that physicians and patients do not, as a general rule, regard all acute care hospitals in the HSA as potential providers of health services to them.

184. With few exceptions, physicians in the Chattanooga urban area refer their patients to hospitals in the urban area (F. 148–62). Physicians in outlying counties do refer some patients to urban area hospitals, but usually only for services which are not available in the community hospitals (F. 163, 165–67). Regular medical treatment is, generally speaking, sought in the area near where the patient lives and the doctor has privileges.

185. Generally, hospitals in the outlying counties of the HSA regard hospitals in the same or adjacent rural counties as competitors; they do not normally consider the urban area hospitals as competitors (F. 177–80). Supporting this view is testimony by urban area hospital

officials that their competitors are the other urban area hospitals (F. 176).

186. The MSA, which contains Hamilton County plus Marion and Sequatchie counties in Tennessee and Dade, Catoosa and Walker counties in Georgia, was rejected by Dr. Harris as a relevant market and was not proposed by Dr. Salkever. I find that this proposed market, as well as the one suggested by Dr. Salkever, the MSA plus Bradley County is too broad, and does not reflect competitive reality, as evidenced by physician referral patterns. These patterns disclose that physicians in the Chattanooga urban area do not usually refer patients to outlying communities in Marion, Sequatchie, Bradley, or other counties in the HSA (F. 148). [41]

187. All proposed relevant geographic markets except Hamilton County meet the LIFO/LOFI requirements of the Elzinga-Hogarty test, but the market proposed by Dr. Harris, the Chattanooga urban area, is the smallest to satisfy that test, and increases the LOFI value by 10 points over the Hamilton County area, whereas the market proposed by Dr. Salkever and those chosen by complaint counsel increase the LOFI value only marginally, suggesting that one need not seek beyond the confines of Dr. Harris' market to find the relevant geographic market.

188. This suggestion is borne out by analysis of referral patterns and industry opinion, which confirm that Chattanooga urban area hospitals compete with each other but not with hospitals in outlying area of the MSA or the HSA (F. 44–62). In conclusion, I find that the relevant geographic market is the Chattanooga urban area, *i.e.*, Hamilton County in Tennessee and Dade, Walker and Catoosa counties in Georgia.

H. *HCA's Managed Hospitals*

1. HCA's Hospital Management Program

189. HCA is the largest manager of hospitals for other owners in the country; with the acquisition of HAI, it increased the number of hospitals it managed from about 50 to 125–30 (Tr. 3755). HCA manages hospitals owned by others to earn a profit from management fees. Another purpose is to give HCA an opportunity to test local regulatory environments and health care market potential in parts of the country where it has no operating experience. Of the approximately 250 hospitals HCA has managed under contract, 10 or 12 were acquired later (Tr. 3737, 3740, 3742; CX's 13N, 895B). HCA's wholly-owned subsidiary, Hospital Management Company, handles its management contracts (Tr. 3627, 3744–45).

190. Most HCA hospital management contracts are for three to five

year terms with a fixed fee, and policymaking control is vested in the hospital owners. Corporate policy precludes variable fee contracts (Tr. 3746). The retention of local control is an important consideration for hospital owners in the communities they serve, and HCA management contracts expressly provide for this control (Tr. 3746–47). Some management contracts are cancelled before they expire, and some are not renewed; most, however, are renewed (Tr. 3751–52).

191. HCA recruits, employs and trains the hospital administrator and controller for most managed hospitals, provides day-to-day management services through the hospital administrator and controller, and provides specialized support services on an as-needed basis (Tr. 3749–50). [42]

192. The management objectives for an HCA-managed hospital are determined by the local governing body representing the owner. HCA does not determine the financial objectives for a managed hospital (Tr. 3752). Rate setting is a function of the financial objectives, and rate recommendations by HCA for managed hospitals suggest what rates will accomplish those objectives (Tr. 3754, 3703).

193. There is no regular contact between corporate executives responsible for owned and managed hospitals or between owned and managed hospital administrators within HCA (Tr. 3743–45, 3625, 3782–83, 3333); however, HCA employees do switch between positions with the HCA management subsidiary and the subsidiary responsible for owned hospitals (Tr. 3647).

194. HCA-managed hospitals are not required to prepare annual management plans as is required of HCA-owned hospitals. The owner of a managed hospital decides what reporting mechanism will be used by the hospital administration (Tr. 3485).

195. Contract-managed hospitals are not required to use the HCA national purchasing contracts, as are HCA hospitals unless they can justify a non-contract vendor because of a lower price (Tr. 3486, 3751).

2. Chattanooga Area Hospitals Managed By HCA

196. HAI previously owned the two hospitals that became Downtown General and Red Bank Community Hospital (Tr. 1174, 1425–26, 1040). Both hospitals were badly in need of modernization. Rather than build new hospitals itself, HAI in 1976 with respect to Downtown, and in 1977 with respect to Red Bank, arranged to have the new facilities built through tax-free bonds.[10] Downtown and Red Bank were completed in 1976 and 1977 respectively (Tr. 1047–49; CX 27D). The cities of Chattanooga and Red Bank financed the building of the hospitals through their Health and Educational Facilities Boards,

[10] In the case of Red Bank, HAI had to arrange for the establishment of a Health and Educational Facilities Board to authorize issuance of the bonds. The members of that board were selected by HAI (Tr. 1076, 1079).

which then leased the hospitals to two newly organized corporations, Downtown Hospital Association and Red Bank Hospital Association, with an option to purchase (Tr. 1047–48, 1076; *see* Tr. 1418–20; CX 212, 628–29). HAI arranged for the formation of these nonprofit corporations with boards of directors it selected to run the new hospitals, and for itself to manage the two hospitals under long-term contracts. HAI, in developing the bond indenture for Red Bank, made sure [43] that the language required the management company to be affiliated with the hospital for the life of the bonds, which is 25 years (Tr. 2026; CX's 628Z–23, 211Z–24). HAI retained ownership of the land under which Downtown was built until it was acquired by HCA (Tr. 1419). HCA still owns that land (Tr. 1419, 1463–64, 3699, 3701).

197. From the beginning of the plans to build the new hospitals, it was understood that HAI would manage them (Tr. 1425). The typical management contract in the hospital industry at that time provided for a fixed fee and a term of 2–3 years (Tr. 1054). However, the management contracts for both Downtown and Red Bank were for 25–year terms with HAI's compensation set at 8% of the hospital's gross revenues (CX's 185Z–1, 624F, 185Z–2, 624H). This resulted in much higher management fees than would otherwise have been paid (Tr. 1054). The fees HAI charged Red Bank were the highest in terms of revenues per bed in the entire company (Tr. 1973). In the case of Downtown, the Board agreed to pay the taxes on the land under the hospital even though HAI owned it (Tr. 1465, 3699–3700). Downtown pays these taxes in addition to the $60,000 a year paid to HAI (and now HCA) for leasing the land (Tr. 3699).

198. The 25–year contracts remained in effect for Downtown and Red Bank until the Department of Health and Human Services ("Medicare") determined that it would not reimburse the hospitals for much of the management fees they paid, since it felt that HAI was a party related to both hospitals and that the fees were neither negotiated arms-length nor were allowable costs for fees paid to a separate entity (Tr. 1193, 1442, 1972). Downtown had to repay Medicare between $100,000 and $200,000, which put the hospital in a difficult financial position. Because of the Medicare problem both management contracts were renegotiated in 1981 (Tr. 1192, 1442; CX's 185A, 189A). The new contracts called for HAI to manage the hospitals for terms of four years (CX's 185I, 189G).

199. The renegotiated Downtown General contract was approved by Blue Cross after it decided that HAI and the hospital were not "related persons" under the 1981 contract (Tr. 1474, 1476; RX 545), and the administrative appeal of the Medicare disallowance ultimately determined that HAI and the Red Bank Hospital Association were not "related parties" under the original contract (RX 1077).

200. In 1981, HCA, as successor to HAI, began to manage three hospitals in the Chattanooga area; Downtown General Hospital and Red Bank Community Hospital (Tr. 3624–25; CX 8F), as well as South Pittsburg Hospital. HCA agrees that to the extent that it may be relevant, South Pittsburg may be treated as an HCA-owned hospital (RB, p. 51, n. 1). However, since this hospital is not located in the relevant geographic market—the Chattanooga urban area—only the extent of HCA's control over Downtown General and Red Bank is at issue here. The testimony of [44] Mr. Arnold Stulce, a member of Red Bank Community Hospital's board of directors (Tr. 1171), of Mr. Chambliss, a member of the board of Downtown General (Tr. 1417) and of Mr. Bennet, a former administrator of the hospital (Tr. 3670) reveals that HCA had no control over the policy formulation of either hospital.

201. The current HCA contract for management of Downtown General provides for a fixed annual fee and will expire in January 1985 (CX 189F-G).

202. The control of and responsibility for Downtown General Hospital is vested in its board of directors (Tr. 3678) while the day-to-day operations of the hospital are the responsibility of the management company under the supervision of the board of directors (Tr. 1432).

203. All matters of policy are determined by the Downtown General board (Tr. 1432). The board, frequently in response to medical staff requests or proposals, sets objectives with respect to occupancy rates, new medical services, quality standards, accreditation, community and patient relations, employee relations, inventory control, accounts receivable, physician recruiting, pension plans, net revenues, and long-range planning (Tr. 3678–79, 3683–86, 3690, 3695).

204. The Downtown General board establishes policies which determine generally what rates will be charged (Tr. 3703), and the hospital administration advises the board as to what the rates are and suggests what rates will be needed in order to meet the hospital's objectives (Tr. 1436).

205. The Downtown General Board believes that the hospital should provide services at the lowest possible cost (Tr. 1480), and does not want the hospital to build up any large cash reserves. Their objective is to have revenues cover expenses with a small amount for contingencies (Tr. 3686–87). If the administrator assigned to Downtown General by HCA were to recommend that the hospital pursue profit maximization, the board would request that HCA change administrators (Tr. 1481–82).

206. Although the management company is responsible for actually hiring employees, it must secure the approval of the board for staff employment. There have been occasions when the board has vetoed

management recommendations regarding new staff (Tr. 1432–33, 1437).

207. The board of Downtown General participates in the review of vendor proposals to the hospital (Tr. 3683) and it also reviews proposed budgets and expects to hear analysis of the budget by the administration and management company representatives (Tr. 1483). Board meetings during which its members review and ask questions about recommendations by management company representatives may be extremely contentious (Tr. 1439). [45]

208. The hospital administrator serves at the pleasure of the board, which would not hesitate to take issue with HCA if a new administrator proved to be unacceptable (Tr. 1477, 1479). Downtown General administrators have always had primary loyalty to the hospital's board and have not hesitated to criticize HCA practices if they did not agree with them (Tr. 1434).

209. The Red Bank Community Hospital board of directors has at all times been responsible for establishing the general principles by which the hospital operates. The board has the ultimate budget authority for the hospital, and must approve any unbudgeted expenditure in excess of $5,000. The board has authority for final review and approval of hospital rates and final authority for admitting physicians to the medical staff. Only the board can amend the corporate by-laws for the hospital (Tr. 1215–16).

210. The Red Bank board has authority to exclude representatives of the management company from a board meeting, and there have been occasions when such persons were excluded (Tr. 1217, 1224; *see, e.g.,* CX's 428A, 429B).

211. Red Bank hospital contracts, such as those with a physician group for particular services, are negotiated by a committee composed of board members appointed by the board chairman (Tr. 1217). Employee hiring by the management company must conform to guidelines established by the board (Tr. 2035–36).

212. The hospital board oversees and supervises the contract services provided by the hospital management company (Tr. 1209). The board members actively participate in board meetings and often question recommendations made by the hospital administrator (Tr. 1218). The Red Bank Board is composed of people of good judgment; the board is not a "rubber stamp" (Tr. 1210, 1219), although the boards of Red Bank as well as Downtown General rely heavily on the advice of their managers and often accept their recommendations (Tr. 1057, 1059, 1080, 1190–92, 1435, 1438–39, 1954).

213. HAI, as contract manager, was responsible for the day-to-day operations of Red Bank prior to the 1981 acquisition of HAI by HCA (Tr. 1178). HCA was never actively involved in managing Red Bank

Community Hospital (Tr. 3628). The Red Bank hospital board requested termination of the management contract in 1981, because they believed that HCA could not properly manage Red Bank while at the same time owning North Park Hospital (Tr. 1198, 2023). Initially, HCA was against termination of the contract and sought to persuade the Red Bank Board that HCA could avoid any conflicts arising from its ownership of a competing hospital (Tr. 1204). **[46]**

214. The termination agreement between Red Bank and HCA relieved the hospital of its obligations to pay certain past due management fees and obligated HCA to pursue a reimbursement dispute which predated the termination agreement (CX 87).

215. Following Red Bank's termination of the management contract with HCA, the hospital contracted for management services from Carolinas Hospital and Health Services (CHHS) of North Carolina (Tr. 1205; CX 24C). The duties and responsibilities of the contract manager under the current management contract are generally the same as they were under the predecessor contract with HCA (Tr. 1206).

216. The current contract between Red Bank and CHHS requires that the administrator be acceptable to the hospital board. The same requirement was included in the predecessor contract with HCA (Tr. 1221), and Red Bank exercised its right in 1982, with the result that a new HHS administrator was appointed (Tr. 1222–23).

I. *Competition Among Acute Care Hospitals*

1. History

217. Because of the unique nature of the patient-doctor relationship and the existence of third-party providers, competition in the health care industry has, until very recently involved considerations other than price (Tr. 2332–35).

218. The health care consumer—the patient—relies upon his physician for basic information about the nature of his illness and its treatment (Tr. 3857–58). The physician acts as the patient's agent by arranging, if necessary, for hospital admission, diagnostic tests, treatment and release (Tr. 3848, 3858–59), and the patient therefore has no control over costs associated with the treatment mandated by his physician.

219. In addition, the patient usually need not concern himself about medical costs because of the prevalence of third-party reimbursement plans (Tr. 3839–40), both private and public. The private insurance area is dominated by the Blue Cross-Blue Shield plans and includes several other commercial insurance companies. The public reimbursement area is dominated by Medicare and Medicaid (Tr. 3834).

220. Most of the private insurance programs reimburse on a charge basis. A charge-based payor reimburses health care providers in accordance with the provider's charge list for health care attributable to patients covered by that insurer. Medicare and Medicaid reimburse health care providers on a cost basis. A cost-based payor reimburses health care providers for [47] the proportion of the institution's costs attributable to patients covered by that insurer (Tr. 3835). Third-party reimbursement of health care costs has been pervasive during the last two decades. By 1967, approximately 90% of hospital expenditures were covered by third-party reimbursement programs, and that figure has remained relatively constant to the present (Tr. 3833–34; RX 1105 (9)).

221. Because there is so little consumer sensitivity to price in the health care industry, there is a low price elasticity of demand (Tr. 2384, 4237–39) and, as a result, price competition among hospitals was limited in the past; instead, hospitals competed primarily for physicians to admit their patients by offering them non-price inducements (Tr. 2333–35).

2. Competition Among Chattanooga Area Hospitals For Patients

222. Physicians in Chattanooga are usually members of the medical staff of more than one hospital (Tr. 172, 1375; CX 892A-Z–27), and because they can choose among them to admit their patients, area hospitals compete for physicians to use their services (Tr. 134, 547, 697–98, 1524, 2045, 3287, 3401, 3474–75).

223. Chattanooga hospitals compete for physicians by offering new services, sophisticated equipment and qualified personnel. Equipment purchasing decisions are often influenced by equipment available in competing hospitals. For example, both Memorial and Erlanger provide heart catheterization equipment, and Erlanger has updated its equipment in response to the better quality of Memorial's (Tr. 174–75). Competition among Chattanooga hospitals by providing sophisticated equipment (Tr. 172–75, 724, 1093, 1392–93, 1539) is considered by area administrators as beneficial to patients; they do not believe that such competition leads to unnecessary duplication because equipment purchases are not made unless they are financially possible (Tr. 461–62, 1392–93, 1542, 3352–54, 3458) and will improve the quality of care (Tr. 174).

224. Chattanooga hospitals also compete in the recruitment of qualified medical personnel (Tr. 171, 698, 1546–47; CX's 18Z–47, 29L, 235Z–31) and offer competitive salaries and benefits to retain them (Tr. 569–70, 1560, 2006; CX's 17Z–38, 143, p. 25, 163A-C, 191C, 227A, 237A, 519A-C, 522A-C, 526A-C). Area hospitals also compete by offering attractive facilities and personalized care to their patients (Tr.

171, 180, 562, 569, 1546). Finally, hospitals in the Chattanooga area have competed to obtain certificates of need for new beds, services, and equipment (Tr. 547, 738–40). [48]

3. Price Competition Among Chattanooga Area Hospitals

225. Hospitals in the Chattanooga area keep abreast of each others' prices by conducting rate surveys, both formal and informal (Tr. 633–34, 1958–59; *e.g.*, CX 276A-E); almost every hospital in the HSA has conducted such surveys at one time or another (CX's 145A-C (Athens), 147A-O (South Pittsburg), 148Z–75 [***] 179A-C (Diagnostic), 184A-G (Downtown), 276A-E (Parkridge), 279A-C) Sequatchie), 286A-E (Red Bank), 316I (Erlanger), 326H (Tri-County), 845 (Medical Park)) or has participated in them (CX 145A-C (Woods, Bradley), 158A-C (Memorial), 161A-C (East Ridge), 279A-C (Bledsoe, Rhea, Whitwell)). HCA administrators testified that the surveys which they conducted were never used for setting rates (Tr. 3306, 3599), but they have been used by area hospitals to determine whether the surveyor's prices were within the range of prices offered by competing hospitals (Tr. 564) or to justify price increase to Blue Cross (Tr. 1965–66; CX's 839, 841, 845).

226. Hospital rates in Chattanooga have not been established without some reference to competitors' rates, for prior to the challenged acquisitions, hospital prices tended to fall into a pattern. Erlanger's prices were always the highest because of its tertiary services, its teaching function, and its obligation to provide indigent care (Tr. 176, 566, 727–28). Memorial's prices were perceived to be the lowest, with the other hospitals' prices somewhere in the middle (Tr. 208, 566, 727–28). Other hospitals in Hamilton County tried to keep their prices not too far above Memorial's and somewhat below Erlanger's (Tr. 1070; *see* CX 486G). Although denying that price plays a significant role in hospital competition, Dr. Harris acknowledged that hospital administrators in Chattanooga are not totally uninterested in their competitor's prices:

> Well they don't want prices too low or they are going to look like they don't sell Tiffany lamps, and they don't want prices too high or maybe they will show up in the newspaper as somehow gouging the public. . . . (Tr. 3892–93). [49]

227. The surveys in the record, many of them conducted by hospitals owned or managed by HAI,[11] listed room rates at some other hospitals, as well as charges for a limited number of ancillary services

[11] An HAI policy required administrators at owned and managed hospitals to survey three or four nearby hospitals concerning a limited number of hospital charges (Tr. 3712, 3599–600). The purpose of this HAI policy was to make certain that rates were not "out of line" with those of other hospitals because of a fear that government regulation would freeze hospital rates at an abnormally low level (Tr. 1060, 1062).

(CX's 179–84, 257, 271, 273–75, 286–87). Also, on occasion, at a meeting of area administrators rate setting would be discussed (Tr. 577).

228. Hospital administrators also conducted rate surveys as a means of determining the efficiency of the hospital, a process which Dr. Harris called yardsticking (Tr. 3893, 4148). For instance, Memorial Hospital conducted a rate survey that included Catholic hospitals in Nashville and Memphis to determine how other Catholic hospitals were doing (RX's 244–45; Tr. 1658). A rate survey performed by Erlanger Medical Center included large hospitals comparable to Erlanger located in other metropolitan areas in Tennessee to compare operating efficiency (Tr. 196, 204; CX's 316H-J, 317E).

229. While rate surveys were conducted in the Chattanooga area, it does not appear that they were a necessary part of the procedure for setting rates because hospital rates are normally determined during the hospital's budgetary process on the basis of total projected costs (Tr. 1645–46, 370, 820–21, 3599, 3301), which can differ substantially (Tr. 3879–80, 1646). Total costs are allocated over the range of hospital services on a selective basis; rather than increasing each service by the same amount or factor, a process is used that requires subjective judgment (Tr. 1542, 1645, 372, 3621, 631).

230. Chattanooga area hospitals typically adjust their charges once a year, normally at the beginning of their fiscal years (Tr. 1645, 1653, 370, 629–30, 3301), and since hospitals in the area use different fiscal years, price changes do not occur at the same time (Tr. 370–71, 629–30, 3301; RX's 270 (2), 638 (1)).

231. The budget cycle for the Chattanooga-Hamilton County Hospital Authority begins in November with preparation of budget data (Tr. 195). Pursuant to state law, the budget is completed and submitted to the Hospital Authority board of trustees for adoption by April 15 (Tr. 371). The medical center and hospital authority operate on a fiscal year ending June 30 (CX 408B). [50]

232. The budget process at Erlanger Medical Center includes determining the expense side of the budget and then determining what rate adjustments, if any, will be required to cover expenses (Tr. 371). Rate increases when made are not uniform across all departments and services (Tr. 372). Rate changes are put into effect annually at the beginning of the fiscal year (Tr. 370).

233. The charge structure for Memorial Hospital is based on the hospital's own costs, not on what other hospitals are charging for their services (Tr. 1646). Rate setting is part of the annual budget process at Memorial Hospital. Expenses and revenues are projected and expenses are reduced where possible; rate increases are then made selectively on an item-by-item basis as necessary to cover expenditures (Tr. 1542–43, 1645–46). Rate changes become effective an-

nually at the beginning of the fiscal year (Tr. 1653) which ends August 31 (Tr. 1542).

234. Parkridge Hospital's budget process begins with an examination of the costs of providing the equipment, personnel, materials and services that are needed to support its operations for the coming year and the hospital determines whether rate adjustments are needed to support the expense side of the budget. If the need for rate increases is indicated, then a rate request is prepared and submitted to Blue Cross for review and approval. The fiscal year for Parkridge Hospital is the calendar year, and rate or charge increases are implemented annually on the first day of the fiscal year (Tr. 3301–03). Rate increases for Parkridge Hospital are not uniformly applied across all services because of different utilization patterns and the impact of the various reimbursement programs. Individual rate adjustments are determined by an item-by-item review. The earnings projection for Parkridge differs from the earnings target for other HCA hospitals. The differences depend upon hospital mix, age of the facility, range of services, and categories of payors (Tr. 3303). Rate comparisons with other hospitals are not used in the Parkridge Hospital budgeting and rate setting activity. Detailed comparative data is not available, and would not be useful. Such comparisons would likely be misleading (Tr. 3306–07, 3599, 1636–37, 1646, 1660).

235. The fiscal year for Tri-County is October 1 through September 30, and rate or charge increases are implemented annually on the first day of the fiscal year (RX 638 (1)).

236. Hospital rate-setting is part of the annual budgeting processing at East Ridge. Pricing at the hospital is determined by adjustments in line with the total patient costs per day and by such other factors as the consumer price index, area economic forecasts and budget targets. East Ridge does not use comparative price information from other hospitals and does not have access to such information (Tr. 728). Prices are revised on an annual basis in connection with the hospital's budgeting process (RX 84 (2)). The fiscal year for East Ridge begins September 1 (CX 654B). [51]

237. Diagnostic Center Hospital personnel do not use rate comparisons with other hospitals in developing rates for Diagnostic. Such comparisons have never been used for this purpose because there is no comparability represented by individual hospital prices (Tr. 3599). Rates at Diagnostic Center are put into effect annually on November 1, assuming Blue Cross approval (Tr. 3598). Rate surveys conducted by Diagnostic Center personnel in late 1980 and early 1981 were required by Hospital Affiliates (Tr. 3599). This practice was discontinued in early 1981 because it was no longer required by HAI and was not useful to the hospital (Tr. 3600). When developing hospital rates

and charges on an annual basis, Diagnostic Hospital personnel review the rates and charges on an item-by-item basis in order to determine whether to make a proposed increase for each item (Tr. 3621).

238. Red Bank Community Hospital reviews and revises its rates on an annual basis (RX 308). The hospital's fiscal year begins on April 1 (CX 24C). Medical Park implemented rate increases once a year at the beginning of the fiscal year (Tr. 629). The fiscal year for Medical Park began on January 1 (CX 75E). New rates for Downtown General Hospital are implemented annually on July 1, the start of the fiscal year for the hospital (Tr. 3674).

239. Chattanooga hospitals must secure the approval of Blue Cross, which reviews proposed new rates on a selective, item-by-item basis, before putting rate changes into effect (Tr. 1543, 1141, 565, 3598, 3304, 3405–06).

240. Although it is difficult to compare the prices of different hospitals because they may have different names for different services, or because one hospital may include a professional charge as part of a charge for services while another may not, Dr. Harris undertook a comparison of hospital charges in the Chattanooga urban area for representative, high volume services (Tr. 3898–99; RX 1083). According to this analysis, different hospitals charged rates for similar services that were 50 to 200% higher than rates charged by other hospitals (RX 1083).

4. Attempts To Control Hospital Costs

241. Large increases in health care costs over the past several years have prompted purchasers of these services to seek ways to control such costs (Tr. 2348). After the Medicare and Medicaid programs went into effect in the mid–1960's, health care costs began to rise, and over a period of seven or eight years grew to become a much larger proportion of employers' total costs (Tr. 2342). Starting in about 1976, the inflation rate for [**52**] health care costs became substantially greater than the general rate of inflation (CX 534E), and the growth rate is increasing. The average growth rate for health care expenditures was 13.9% from 1976 to 1981; for 1980 and 1981, however, it had grown to over 15% (CX 534A). The share of the Gross National Product accounted for by health care rose from 8.9% in 1979 to 9.8% in 1981 (CX's 534A, 582, p. 41), and in 1982, it reached 10.5% (Tr. 3815). Hospital inpatient services comprise nearly half of health care expenditures (CX's 530C, 534G). Even though use of hospital services per person remained stable and average length of stay decreased, total expenditures on hospital care almost doubled from 1972 to 1977 (CX 530C). From 1980 to 1981 alone, there was a 17.5% increase in expenditures for hospital care (CX 534G).

242. [***] (CX 209Z–8), and purchasers of health services have indeed become alarmed. Employers have realized that health care benefits provided to employees are a major element of their costs and have put pressure on insurance companies to come up with solutions. Employees have become concerned as well, because their premiums have been increasing (Tr. 2341–43). Employers in the Chattanooga area are experiencing these same cost increases and they have been forced to make significant changes in their employee health benefit plans (Tr. 976–77, 1232–33, 1806, 1809).

243. Provident Insurance Company's model insurance plan, which it believes will give employees incentives to seek less costly health care (Tr. 851), is a good example of the type of plan that is becoming more prevalent. It calls for 20% coinsurance[12] and a $100 to $150 deductible (Tr. 852).[13] Other Chattanooga area employers are making similar changes in their employee health plans. For example, Siskin Steel Company changed from a plan with basic benefits for hospitalization with no deductible or coinsurance to a plan with a $100 deductible and 20% coinsurance for hospitalization (Tr. 1232, 1243). American Manufacturing Company went from a similar basic benefits plan (Tr. 1804) to a plan with a $200 deductible and a 20% coinsurance payment (Tr. 1802; *see also* Tr. 970, 972 (change to plan with $300 deductible and 20% coinsurance)). These changes are intended to encourage employees to become more cost conscious (Tr. 1234, 978; *see* Tr. 1809), and therefore to be more sensitive to differences in the cost of different health care providers. Blue Cross also offers, in addition to basic coverage, a [53] comprehensive plan with a deductible ranging from $100 to $250 and a 20% coinsurance amount (Tr. 1295–96). This type of coverage has been available for the past three or four years, and Blue Cross now sells more of these plans than the traditional basic coverage (Tr. 1297).

244. In addition to encouraging cost consciousness through new health insurance plans, Chattanooga area employers have been counseling their employees to seek health care from low cost providers. In response to its encouragement (CX's 601, 605A-B), various companies have urged their employees to utilize Memorial because of its low costs (Tr. 1533). For example, Bristol Steel Corporation advises employees to go to Memorial, based on information about hospital prices obtained from insurance companies and hospitals (Tr. 1915) and its employees are encouraged to be cost conscious, and to let their physicians know that they are concerned about costs (Tr. 1914). Siskin Steel educates its employees on what they can do to save money (Tr. 1234)

[12] Coinsurance refers to the percent of the hospital bill paid by the employee, rather than the insurer (Tr. 849–50).

[13] A deductible is a dollar amount up front for which the insured is responsible before any benefits accrue (Tr. 849).

and tries to steer them to Memorial because it is "less expensive and as good" (Tr. 1236).

245. Recently, Chattanooga area hospitals have begun to make some efforts to compete on the basis of price. Memorial has taken advantage of its lower costs to encourage employers to steer their employees to it (Tr. 177). It has disseminated newsletters to Chattanooga industries encouraging price shopping for health services (CX 601) and preadmission counseling of employees (CX 605A-B). Memorial has urged employers "to identify the hospital which is giving your employees the best service for the least dollar amount [and] to take a look at the price differential among hospitals. . . ." (CX 601).

246. East Ridge has implemented an "acuity pricing" system for its emergency room that it advertises to the public (Tr. 703–04, 574). Under that system there are different levels of charges for different degrees of illness or injury treated at East Ridge's emergency room (Tr. 703–04, 626). East Ridge's "Stork Club" publications urge prospective parents to inquire about hospital accommodations and rates (CX 255D) and explain the pricing system at the hospital (CX 265). [***] (CX 38Z–96). [***] (CX's 148Z–75, 235Z–71). Sequatchie's administrator testified that it has provided discounts to its patients by waiving deductibles and coinsurance (Tr. 574) and has advertised these terms to the community (Tr. 629). Even Erlanger, which is in general unable to price compete (Tr. 176), has lowered its rates in response to competition (Tr. 178, 268).

247. HCA has acknowledged the increasing concern about runaway hospital costs. Its executive vice president has predicted a more price competitive environment for hospitals [54] because of increased pressure from private industry (CX 421Z–2; *see also* CX's 100H, 111Z–16) and a 1981 HCA strategy document stated that [***] (CX 100Z–27). [***] (CX 209Z–8), [***] (CX 209H; *see also* CX 108Z–1), [***] (CX 101Z–9). Another HCA document reflects the belief that [***] (CX 221Z–2; *see also* CX's 357A-B, 209Z–17, 110W, 209Z–18).

248. The growing importance of price competition is also reflected in HCA's policy that its hospitals should attempt to keep their charges at a competitive level. Its 1982 Form 10–K states that "[t]he rates charged by the Company's hospitals are intended to be competitive with those charged by other local hospitals for similar accommodations, supplies and services" (CX 13Q; *see also* CX 8N), and the 1983 Management Plan for HCA East, the division that includes Chattanooga hospitals, states that [***] (CX 110K). This strategy is in keeping with the sentiment expressed two years earlier by HCA's Eastern Operations Division, to [***] (CX 346I). Indeed, HCA believes it will be able to [***] (CX 209Z–10), [***] (CX 209"O"; *see also* CX 313M (discounting as a competitive strategy)).

249. Further pressures on hospital prices may be provided by health maintenance organizations (HMO's) and preferred provider organizations (PPO's) which operate as group purchasers of health services.

250. An HMO is a plan in which a subscriber prepays a fixed fee in return for comprehensive health care. HMO's generally have contractual arrangements with physicians and hospitals to provide care to their members, and its enrollees, studies suggest, may have lower health care expenditures than other patients (Tr. 50–51). According to HCA's President and Chief Executive Officer, "[a] successful HMO will help make other providers in a given market more responsive to consumers, as well as more cost conscious" (CX 123E).

251. A PPO is an arrangement whereby health care providers contract to provide services at a discount to volume purchasers of health care such as employers or other third-party payers [55] (CX 616I; Tr. 3853). There is generally a financial incentive for the group members or patients to use that provider (CX 309A-B). An example of such an arrangement is the PPO recently created by HCA in Florida, on a discounted fee-for-service basis (CX 616I). The PPO, which will be marketed to volume purchasers of health care services, is "designed to introduce a new competitive element into the comprehensive health care market" (CX 616J).

J. *Barriers To Entry*

1. Certificate Of Need And Related Regulatory Programs

252. Both Tennessee and Georgia have statutes requiring certificates of need ("CON") for, among other things, the establishment of acute care hospitals, the expansion of their bed capacity, significant hospital capital expenditures and changes in the services they offer, and similar actions in connection with non-hospital health facilities (Tennessee Health Planning & Resources Development Act of 1979, Tenn. Code Ann. 68–11–101 to –107 (1983 & Supp. 1983), *as amended by* Act to Amend Tennessee Health Planning & Resources Development Act, Pub. Ch. No. 814 (May 25, 1984) [hereinafter "THPRDA Amendments of 1984"]; Ga. Code Ann. 31–6–1 to –50 (Supp. 1983)). The stated purposes of these statutes include avoiding unnecessary duplication of health services and promoting their orderly and economical development (Tenn. Code Ann. 68–11–106(a) (Supp. 1983); Ga. Code Ann. 31–6–1 (Supp. 1983).

253. Acute care hospitals, psychiatric hospitals, nursing homes, ambulatory surgical centers and other health care providers are subject to CON regulation in Tennessee and Georgia (Tenn. Code Ann. 68–11–103(5), –106(g)(1) (Supp. 1983), *as amended by* THPRDA Amendments of 1984; Tenn. Admin. Comp. ch. 0720–2–.01; Ga. Code

Ann. 31–6–2, (8), (12), –40(b) (Supp. 1983). A CON is needed for any project of a provider which involves:

(a) establishment, construction or relocation of the health facility;
(b) any increase or decrease in bed capacity;
(c) any conversion of bed capacity from long-term to acute care, or vice versa;
(d) the initiation or discontinuance of certain "health services" at a health facility, including, among other things, medical/**[56]** surgical, obstetrical, and psychiatric services;
(e) acquisitions of medical equipment costing more than $500,000 in Tennessee, or more than $400,000 in Georgia; or
(f) other capital expenditures in excess of $500,000 in Tennessee, or $600,000 in Georgia.

(Tenn. Code Ann. 68–11–103 (9), (11), –106(g)(1) (Supp. 1983), *as amended by* THPRDA Amendments of 1984; Tenn. Admin. Comp. ch. 0720–2–.02; Ga. Code Ann. 31–6–2 (5), (14), –40(b) (Supp. 1983); Ga. Admin. Comp. ch. 272–2–.01 (8), (11), (17)).

254. In Tennessee, a CON may be granted for a project only if it is "necessary to provide required health care in the area to be served . . . and will contribute to the orderly development of adequate and effective health care facilities and/or services" (Tenn. Code Ann. 68–11–106(h) (2), *as amended by* THPRDA Amendments of 1984) and a CON may be granted in Georgia only if the project is "needed" (Ga. Code Ann. 31–6–40(a) (Supp. 1983)).

255. The procedures for obtaining a CON in Tennessee (as well as the similar procedures in Georgia)[14] involve several stages. The process for determining whether a CON is granted for a project begins with the initiation of the "review cycle," which commences after a CON application is submitted to the Tennessee Health Facilities Commission ("THFC"), and the THFC staff determines the application to be complete (Tenn. Admin. Comp. ch. 0720–2–.03(5)). A public hearing is then held in the area where the proposed project is to be located, if one is requested by an "interested party" (Tenn. Code Ann. 68–11–106(i)(2), *as amended by* THPRDA Amendments of 1984). The CON application is reviewed by the Tennessee state health planning and development agency ("SHPDA") (currently the Department of Health and Environment (Tenn. Code Ann. 68–11–104(a) (Supp. 1983)); it then reports the results of its review to the THFC (Tenn. Admin. Comp. ch. 0720–2–.03 (6), (8), (9)). After the public hearing and the SHPDA's report on the application, the THFC makes its initial deci-

[14] The Georgia CON process is fundamentally similar to that of Tennessee, except for minor differences in the time periods allowed for different stages of the process, and the power of Georgia's health planning agency to make the initial decision on a CON application (subject to administrative appeal to an independent state board) (*See* Ga. Code Ann. 31–6–43 to –44 (Supp. 1983); Ga. Admin. Comp. ch. 272–2–.04).

sion on the CON application. The THFC's initial decision may [57] be appealed by the applicant, the local Health Systems Agency (where there is one), certain persons who have previously participated in the proceeding, and (upon showing of good cause) any other person (Tenn. Code Ann. 68–11–106(l) (1) (Supp. 1983)). Upon such an appeal, the THFC holds a public hearing, which is to be commenced within 45 days (Tenn. Code Ann. 68–11–106(l) (2) (Supp. 1983)). Within 45 days of the hearing, the THFC decides the appeal (Tenn. Code Ann. 68–11–106(l) (3)). The THFC's decision is in turn subject to judicial review at the instance of any "aggrieved" person (*Id.;* Tenn. Code Ann. 4–5–322(a) (1983)).

256. Georgia not only regulates health facilities under its CON program, but also indirectly regulates them through another review of health facility capital expenditures, pursuant to an agreement with the Federal Government under Section 1122 of the Social Security Act (42 U.S.C.A. 1320a–1 (West 1982); 42 C.F.R. 100.101–.109 (1983); Ga. Code Ann. 31–6–50 (Supp. 1983); Ga. Admin. Comp. ch. 272–3–.01 to –.03; RX 778 (46)).

2. HCA's Views On The Impact Of CON Programs

257. In an interview published in the *Harvard Business Review* in 1981, HCA's President, Thomas J. Frist, Jr., stated:

> Federal and state health planning laws have erected formidable barriers to entry into the hospital industry by creating literal monopolies for physicians and hospitals. If the health planning laws state that a community can have only one cardiac surgery program, they might as well give the physician who performs that surgery an exclusive franchise. It's the same for hospitals.

(CX 123D). Dr. Frist also said that these barriers to entry benefit HCA because they "protect our hospitals from competitors who might build new facilities and take away our market. We know what the market for a particular institution is going to be like five or ten years down the road" (CX 123C), and he claimed that "regulation severely restricts new hospitals from entering our markets" (CX 123F).

258. Other HCA statements and actions reflect its belief as to the restrictive effect of CON regulation on entry and expansion. In its 1982 Form 10–K, filed with the Securities and Exchange Commission, HCA states that "state certificate of need laws and Public Law 92–603 place limitations on the Company's and its competitors' ability to build new hospitals and to expand [58] existing hospitals. . . ." (CX 13S). HCA's 1982 Management Plan for its Mergers and Acquisitions Division observes that [***] (CX 125D) and its 1980 Corporate Strategy Statement noted that [***] (CX 221Z–8). David G. Williamson, Jr., Executive Vice President of Domestic Development of HCA (CX 6Z–29), in a paper prepared for presentation at a 1981 conference, re-

ferred to the "franchise value" and "franchise type protection" of hospitals that is created by certificate of need regulation (CX 124H, J). This franchise value was quantified on one occasion by William G. White, HCA Senior Vice President of Acquisitions (CX 6Z–29), when he attached a value of $8 million, or $20,000 per bed, to the certificates of need for a total of 400 psychiatric hospital beds held by HCC (which HCA was seeking to acquire at the time) (CX 136A-B). A dollar value for a CON was also designated when HCA offered to purchase the bed complement of Medical Park Hospital—without the land, building or its contents—for about $400,000 in late 1976 or early 1977 so that HCA could add those beds to Parkridge's bed complement (Tr. 613). And Jonathan Grimes, administrator of HCA's North Park Hospital, urged HCA to consider acquiring Red Bank Community Hospital in order to acquire the right to operate beds that could be transferred to North Park (CX 420A).

3. CON Experience In Chattanooga

259. Peaches G. Blank, former executive director of the Tennessee Health Facilities Commission (Tr. 2066), and a frequent attendee at THFC meetings after her departure from the Commission (Tr. 2086), believes it is "very difficult to get the Commission to allow new beds to be constructed" (Tr. 2085), and that it is even more difficult (and rarely possible) to persuade the THFC to grant a CON for a new hospital (rather than for new beds for an existing hospital (Tr. 2086). Other witnesses familiar with the Chattanooga area testified that it is difficult to obtain CON approval for additions of new bed capacity (Tr. 482, 3429, 3431–32, 3436). On the other hand, HCA employees denied that the CON process imposes any significant burden on a hospital seeking to expand its services or facilities (Tr. 3308, 3258, 3482–83). Complaint counsel argue that this testimony is not credible since it is at odds with the statements of Mr. Frist (F. 257), but I believe that this conflict merely reflects the difficulty of deciding to what extent CON requirements are a barrier to eventual entry or expansion, for recent history reveals that hospital expansion has occurred in Chattanooga and expert studies suggest that entry or expansion may not be as difficult as some industry members believe.

260. There is no doubt that the CON process can cause delay (Tr. 241–43, 3436), but there has been steady hospital entry and [59] expansion in the Chattanooga area in recent years, including the opening of Parkridge Hospital in 1971 (Tr. 3276), the opening of East Ridge Hospital in 1974 (Tr. 681), the construction of Downtown General Hospital as a new replacement facility for the outdated Newell Clinic in 1976 (Tr. 1047–49), the construction of Red Bank Community Hospital in 1977 as a replacement for the obsolete Women's Hospital (Tr.

1172–76), and the construction of North Park Hospital as a replacement for the obsolete Medical Park Hospital in 1982 (CX 504E).

261. A number of hospitals in Chattanooga have also expanded and made substantial improvements in facilities, including Memorial Hospital's expansion of its facilities and bed complement from 245 beds to 365 beds between 1967 and 1983 (Tr. 1503, 1670); Memorial Hospital's current $12 to $13 million expansion program (Tr. 1614–15); Erlanger Medical Center's $90 million expansion and renovation program (Tr. 129, 323–26; RX 761); East Ridge Hospital's $11 million renovation and expansion program (Tr. 767–68); Parkridge Hospital's addition of 73 beds in 1981 and the subsequent expansion of its intensive care unit and support service facilities (Tr. 3276, 2378); and Diagnostic Center Hospital's addition of 31 beds in 1981 (Tr. 3608).

262. Memorial Hospital has had no CONs denied (Tr. 1674) and Erlanger Medical Center has never been prevented from carrying out any of its plans by CON requirements (Tr. 346). The large majority of CON applications filed in Chattanooga have been approved, including a substantial majority of new inpatient bed applications (RX 1088).[15]

4. Expert Opinion

263. Dr. Salkever testified that CON regulation posed a "very substantial obstacle" to new entry or expansion of bed capacity in the Chattanooga area (Tr. 2321, 2325–32). Supporting this conclusion, in his opinion, is evidence that hospital administrators in the Chattanooga area had been deterred from even applying for CON approval of additional bed capacity they wanted (Tr. 2327); that there were significant costs and delays involved in the CON process (Tr. 2327); that CON regulation created a "franchise value" for existing hospitals by restricting opportunities to build a hospital or add hospital beds without [60] purchasing existing hospitals or their bed complement (Tr. 2327–28); that HCA officials recognized that CON regulation is a barrier to acute care hospital entry and expansion (Tr. 2328); that attempts to add acute care hospital bed capacity in the Chattanooga area often failed, or were delayed for several years, because of CON regulation (Tr. 2328–30); and that local health planners considered the Chattanooga area to be "overbedded," and therefore were not inclined to approve additions to bed capacity (Tr. 2330–32).

264. Dr. Salkever's opinion was based on his analysis of approvals and denials, but both he and Dr. Harris agreed that any regulatory process is bound to result in some denials (Tr. 2554), and there is little doubt that the use of crude approval-denial rates will produce false

[15] There have been some denials. A recent application by North Park Hospital to add obstetrical services was denied, together with a parallel application filed by East Ridge Community Hospital. An application by a religious group to build a hospital in Collegedale in eastern Hamilton County was denied and is on appeal (RX 1088).

conclusions (Tr. 2554, 3930–31, 3941) because the motivations for gamesmanship created by the CON application process will inevitably result in applications for projects that would very possibly not have been carried out even if there were no CON requirement (Tr. 2552–53). For example, firms may submit inflated proposals, expecting a process of negotiation with the regulatory authorities to result in a scaled-down compromise consistent with what the applicant really wished to do in the first place (Tr. 2553). On other occasions, an application may be filed well in advance of any actual desire to begin work, in the hopes that an initial denial will pave the way for approval of a later reapplication (Tr. 2553). In other cases, a firm may submit an application simply to get its proposal on the record, before it has really decided itself whether the project is worthwhile. An eventual denial or withdrawal of the application may merely coincide with the applicant's own determination that the project does not make sense (Tr. 2583).

265. Because of the problems associated with the use of approval-denial evidence, statistical studies comparing hospital construction and investment levels in jurisdictions with and without CON regulations give a more reliable indication of the effect of the CON process on entry and expansion.

266. The only study which has found that CON's were a barrier to hospital bed construction was one conducted by Dr. Salkever and a collaborator. After examining data for 1968 to 1972 which compared hospital construction and investment in the five earliest states to adopt CON laws with comparable activities in other states, this study found a significant negative effect of CON laws on the addition of new hospital beds, which was counterbalanced by a significant positive effect on the amount of money invested per bed (Tr. 2557). That is, according to their data, hospitals added fewer beds, but spent more money on other equipment and facilities. Overall, CON laws in these early states had no effect on total hospital costs (Tr. 2558).

267. Dr. Salkever updated his study by analyzing data on hospital construction and investment from the period 1971 to 1974 [61] and, in this case, found that CON laws had no significant effect on new hospital beds (Tr. 2569; RX 1127). A further analysis of the 1971–1974 data also found no significant effect on new hospital beds (Tr. 2570; RX 1128). Other studies have come to the same conclusion.

268. Professor Paul Joskow in his study of CON laws found that any effects of CON regulation were in reality attributable to the simultaneous existence of state rate regulation programs (Tr. 2578–80). Dr. Hellinger found that the only effect of CON regulation was the positive effect on the rate of investment in the first years of such regulation, which he attributed to preemptive investments to take ad-

vantage of grandfathering provisions (Tr. 2573). Drs. Sloan and Steinwald in their study of CON regulation found no evidence that CON laws curtailed bed growth, but rather that CON laws had a positive effect on bed growth. In particular, they found that bed growth occurred in anticipation of CON regulation (Tr. 2574). A study of CON regulation by the Policy Analysis Group found that CON laws had no significant effect on bed growth (Tr. 2575–77). A United States Department of Health and Human Services review of CON studies concluded that on average CON programs have not been effective in constraining hospital investment in beds, plant assets and assets per bed (Tr. 2585, 3932).

269. Complaint counsel also argue that capital costs are a barrier to entry (CPF IX 35–37), but this is inconsistent with the reason for CON requirements, *i.e.*, that there has been too much investment and duplication in the health care field (Tr. 3481; S. Rep. No. 1285, 93d Cong., 2d Sess. 39 (1974)).

5. Conclusion

270. While Tennessee's and Georgia's CON regulations would seem, on first impression, to create barriers to new entry and expansion in the acute care hospital market, scholarly analysis of the actual effect of such regulations in other areas of the country strongly indicates that, if health care authorities believe that a need exists, new entry or expansion will eventually occur (F. 265–68), and the recent history of entry and expansion in the Chattanooga area supports this conclusion (F. 260–62).

271. However, HCA's emphasis of these facts ignores an even more important consideration—that "need" in the acute care hospital market in CON states is not determined wholly by market forces, but by state administrators, and, because they are "interested parties," by hospitals whose market shares would be diluted by new entry and expansion. **[62]**

272. The result is that while needed entry or expansion will most likely occur eventually,[16] it can be delayed for several years by the CON procedure and by determined opposition using those laws.

273. Before the CON review process can begin, the applicant must complete its application. For major projects, completion usually takes between two and five months (Tr. 242, 735). Additional time may be needed to respond to inquiries of the THFC or Georgia State Health Planning Agency staff should there be some question as to whether the application is complete, or to clarify the application (Tr. 2088–89; *see* Tr. 242). Even after the application is deemed complete, there may

[16] It is doubtful however, whether health planning authorities in Tennessee and Georgia will find that any need for additional facilities in the HSA will exist in the foreseeable future (Tr. 2331–32).

be a further delay of up to two months before the review cycle begins for the proposed project (Tenn. Code Ann. 68–11–106(h) (1), *as amended by* THPRDA Amendments of 1984).

274. Once it has begun, the length of the review cycle, from its beginning to the due date for the initial administrative decision as to whether or not to grant the requested CON, is at least 90 days; the THFC may defer action beyond the 90-day period for up to 40 days if necessary to clarify information concerning the application (Tenn. Code Ann. 68–11–106(k)(1)(C), *as amended by* THPRDA Amendments of 1984).

275. The completion of the CON process can be further delayed by administrative appeals. These delays are of particular importance in Tennessee, where administrative appeals of THFC decisions have suffered from a backlog of about a year in recent years (Tr. 735–36; RX 898). Decisions on CON applications are also subject to judicial review which may create further delay. For example, review of the March 27, 1979 THFC grants of CONs for additional beds to Parkridge Hospital and Diagnostic Hospital was not completed until January 6, 1981—more than 21 months later. The delays occasioned by judicial review contributed to a total delay between the submission of CON applications and the affirmance of those CONs upon judicial review of more than three years (RX's 1051 (1)–(12), 1057 (1)–(12), 1088 (5)).

276. The CON process provides existing hospitals in the Chattanooga area ample opportunity to significantly delay the entry of a new hospital, or the expansion of an existing hospital in that area. Representatives of existing hospitals may (and frequently do) participate in the public hearings held prior to the initial decision on an application in order to express **[63]** opposition to the application (Tr. 233, 826–27, 2091–92; CX's 115, 118, 127, 129–30).

277. This potential for delay was recognized by the board of directors of Red Bank Community Hospital in a meeting held after the Tennessee Health Facilities Commission's initial decision to approve a CON for the relocation of Medical Park Hospital to nearby Hixson (*see* CX 186A-B). An attorney who represented the board before the THFC in that CON proceeding reported to the board that if it appealed the THFC's decision, there would likely be a delay of about six months before the appeal could be heard, and that while the appeal was pending, Medical Park probably would be unable to obtain financing for the relocation project. Board chairman Arnold Stulce supported an appeal not only because it might succeed in blocking the relocation of Medical Park, but also because it would delay the relocation for several months or more—a delay that he recognized would benefit Red Bank. The board authorized the appeal (CX 186B).

K. *The Competitive Effects Of The Acquisitions*

1. Market Shares And Concentration

278. There are three ways to measure HCA's share of the acute care hospital market in the relevant geographic market, the Chattanooga urban area: licensed bed capacity and inpatient days, preferred by complaint counsel, and net revenues, which HCA claims is the most accurate measure of market presence.

279. Market share based on the number of beds measures the capacity of acute care hospitals in the market (Tr. 2368, 3951) whereas inpatient days disclose the current distribution of business among those hospitals (Tr. 2368). Since actual occupancy in Hamilton County varied over a wide range in 1981 (RX 986 (250)), use of bed capacity does not measure actual utilization (Tr. 3952). Inpatient days, a measure which was preferred by the Commission's expert in *American Medical International, Inc.*, Docket No. 9158 (FTC Opinion July 2, 1984) [104 F.T.C. at 177] (Tr. 2818), ("AMI") does reveal current market performance, but only with respect to inpatients; it ignores outpatient care, a significant, and growing, segment of the business of acute care hospitals (F. 79).

280. Since outpatient care, which may result in subsequent inpatient treatment, is one of the cluster of services offered by acute care hospitals, and hospitals in Chattanooga do compete in offering this service, I find that net revenue, which combines revenues derived from inpatient and outpatient care, is the single best indicator of market performance (Tr. 3950–51). **[64]**

281. The following charts summarize the market share of acute care hospitals and the pre- and post-acquisition Herfindahl-Hirschman Index ("HHI") in the relevant geographic market—the Chattanooga urban area—using the preferred basis of measurement, and the alternatives proposed by complaint counsel.[17]

TOTAL NET REVENUES
CHATTANOOGA URBAN AREA
Year Ending September 30, 1981

Hospital	Total Net Revenues Number	Percent
1. Erlanger	$ 81,720,182	41.5%
2. Memorial	32,595,614	16.5%
3. PARKRIDGE (HCA)	25,369,204	12.9%
4. Tri-County	21,795,127	11.1%
5. East Ridge	11,689,926	5.9%

[17] The charts do not add Red Bank or Downtown General shares to HCA's market share because it does not control these hospitals.

6. DIAGNOSTIC (HAI)	5,763,000	2.9%
7. Red Bank	5,359,473	2.7%
8. MEDICAL PARK (HCC)	4,706,140	2.4%
9. Downtown General	4,548,826	2.3%
10. Tepper	2,991,414	1.5%
11. Wildwood	606,500	0.3%
TOTAL	$197,145,406	
HCA (Parkridge)	12.9%	
HAI (Diagnostic)	2.9%	
HCA + HAI		15.8%
HCC (Medical Park)	2.4%	
HCA + HAI + HCC		18.2%
Herfindahl Index Before Acquisitions		2344
Change from HAI Acquisition		75
Herfindahl Index After HAI Acquisition		2419
Change from HCC Acquisition		75
Herfindahl Index After HAI & HCC Acquisitions		2495**[65]**

APPROVED ACUTE CARE BEDS
CHATTANOOGA URBAN AREA
As of September 30, 1981

Hospital	Approved Beds Number	Percent
1. Erlanger	780	35.8%
2. Memorial	349	16.0%
3. PARKRIDGE (HCA)	296	13.6%
4. Tri-County	237	10.9%
5. East Ridge	128	5.9%
6. MEDICAL PARK (HCC)	83	3.8%
7. DIAGNOSTIC (HAI)	80	3.7%
8. Downtown General	65	3.0%
9. Tepper	64	2.9%
10. Red Bank	57	2.6%
11. Wildwood	39	1.8%
TOTAL	2178	
HCA (Parkridge)	13.6%	
HAI (Diagnostic)	3.7%	
HCA + HAI		17.3%
HCC (Medical Park)	3.8%	
HCA + HAI + HCC		21.1%
Herfindahl Index Before Acquisitions		1933
Change from HAI Acquisition		100
Herfindahl Index After HAI Acquisition		2032
Change from HCC Acquisition		132
Herfindahl Index After HAI + HCC Acquisitions		2164**[66]**

PATIENT DAYS
CHATTANOOGA URBAN AREA
Year ending September 30, 1981

Hospital	Approved Beds Number	Percent
1. Erlanger	201,098	35.6%
2. Memorial	108,215	19.2%
3. PARKRIDGE (HCA)	77,768	13.8%
4. Tri-County	62,494	11.1%
5. East Ridge	35,328	6.3%
6. Downtown General	18,643	3.3%
7. DIAGNOSTIC (HAI)	17,716	3.1%
8. MEDICAL PARK (HCC)	15,535	2.8%
9. Red Bank	15,521	2.8%
10. Tepper	8,701	1.5%
11. Wildwood	3,320	0.6%
TOTAL	564,339	
HCA (Parkridge)	13.8%	
HAI (Diagnostic)	3.1%	
HCA + HAI		16.9%
HCC (Medical Park)	2.8%	
HCA + HAI + HCC		19.7%
Herfindahl Index Before Acquisitions		2028
Change from HAI Acquisition		87
Herfindahl Index After HAI Acquisition		2114
Change from HCC Acquisition		93
Herfindahl Index After HAI & HCC Acquisitions		2208

282. Using the preferred measure, HCA's acquisition raised the HHI from 2344 to 2495 (RX 1096 (1)). Under the *Justice Department Merger Guidelines*, CCH Trade Reg. Rep. No. 655, § 3.11(c) (June 14, 1984), ("Justice Merger Guidelines") relating to horizontal mergers, where the post-merger HHI is above 1800, a market is considered to be "highly concentrated," and additional concentration (an increase in the HHI of over 50 points) resulting from a merger in that market is a matter of significant competitive concern; this is, however, not the only fact which must be considered before the competitive impact of the mergers can be assessed. Other considerations include the strength and weaknesses of the acute care hospitals in the market, barriers to entry, the probability of interdependent behavior, HCA's potential exercise of market power, and possible defenses. [67]

2. Competitive Position Of Chattanooga Area Hospitals

a. *Erlanger Medical Center*

283. Erlanger is a public hospital and the major tertiary care provider for the Chattanooga area (Tr. 92, 94–95, 110–11, 1374–75, 1408–

09). It is required by law to provide care to indigent Hamilton County patients (Tr. 111; CX 408Z–17) and virtually all indigent patients in the county are treated at Erlanger (Tr. 134). Erlanger's tertiary care costs cannot be recovered from patients using these services, and must be shifted to other patients (Tr. 883).

284. Other hospitals in Hamilton County have no obligation to treat indigent patients and routinely transfer them to Erlanger (Tr. 115; CX 411C-D). Parkridge Hospital, an HCA-owned hospital, stated in its 1982 Management Plan that [***] (CX 38Z–17). HCA acknowledges that when there are public hospitals in an area, its hospitals do not treat indigents (CX 411C-D; *see also* CX 123E-F), and it has devised a strategy to deal with public reaction to its position of not treating such patients (CX 412).

285. In 1981, Erlanger provided more than $12.6 million worth of charity care, which accounted for approximately 12.3% of its gross revenues (CX's 66E, 638K). The other hospitals in Hamilton County together provided only $152,960 worth of charity care (CX's 16E, 30E, 36E, 62E, 63E, 67E, 68E, 75E). For example, Parkridge Hospital in 1981 provided $23,237 worth of charity care, which amounted to approximately .07% of its gross revenues (CX 36E). In 1982, Erlanger's cost of providing indigent care was approximately $15 million, but only $3 million worth of funds for indigent care was provided by the county (*See* Tr. 112–13). This means that $12 million of the cost of providing indigent care was shifted to paying patients (CX 597H; *see* CX 53E).

286. Mr. Lamb, its former administrator, estimated that Erlanger's rates are $50 higher than they would be if it did not provide indigent care, and more than 100 beds are generally used for such care (Tr. 113–15). Erlanger also treats a disproportionate number of Medicare patients, for which it may not receive full reimbursement (Tr. 883).

287. Erlanger is a teaching hospital, and salaries of residents and support of the medical facility cost it about $3 million a year (Tr. 109).

288. Erlanger's market share includes 30 beds at the Willie D. Miller Eye Center, a facility located adjacent to the main [68] hospital which is used exclusively for the treatment of eye ailments. No other facility in the HSA provides the care offered at this center. There is virtually no overlap in use between the eye center and Baroness Erlanger Hospital. Furthermore, there is a contract between Erlanger and the Chattanooga Ophthalmological Foundation that provides that only patients receiving eye care can be admitted to the eye center (Tr. 107–08).

b. *Tri-County Hospital*

289. Tri-County Hospital has an obligation to care for indigent residents of Georgia, and treats the majority of such patients in Walker, Dade, and Catoosa counties. It also treats a substantial number of Medicaid patients (Tr. 116, 685; CX's 597H, 302H, L). Approximately 13% of all admissions to Tri-County consist of Medicaid, free care, and bad debt patients (CX 302L; *see* CX 326Z–48). In 1981, approximately 8.4%, or more than $2.2 million worth, of Tri-County's gross revenues was attributable to Medicaid and charity (CX 106K). In 1981, Tri-County Hospital provided approximately $564,424 worth of charity care as compared to Parkridge Hospital which provided approximately $23,237 worth of such care (CX's 36E, 106K). In 1982, Tri-County provided $600,000 worth of charity care and has budgeted $1.8 million in free care for 1983 (CX's 326Z–52, 597H). Parkridge, in 1982, provided only $17,203 worth of charity care (CX 505E). Tri-County also has substantial costs in connection with its nursing program which is operated in conjunction with the University of Tennessee at Chattanooga (*see* CX 326Z–52). The costs associated with providing care to indigent and Medicaid patients and its teaching program result in a cost-shift from non-paying patients to paying patients of approximately $70 per day (CX 118D).

c. *Metropolitan Hospital*

290. Metropolitan Hospital, formerly Tepper Hospital, is a 64–bed proprietary hospital owned and operated by American Healthcorp, Inc., a hospital management company (Tr. 1045, 1090; CX's 58A, F, 15, p. 142). Tepper was formerly a pediatric hospital owned by a pediatrician whose physician group practices at the hospital. Metropolitan now provides some diabetes services to adults but still focuses primarily on pediatrics (Tr. 1090, 454). Approximately 70% of its patients are pediatric (Tr. 1091). However, it does not offer the level of intensive care in pediatrics offered by T.C. Thompson Children's Hospital (Tr. 105–06, 448). It is the only hospital in Hamilton County not accredited by the Joint Commission on Accreditation of Hospitals ("JCAH") (CX's 58A, 15, p. 142). The physicians practicing at Metropolitan are primarily pediatricians, with an otolarynogologist and two physicians who specialize in diabetes treatment (Tr. 1091). Because Metropolitan focuses on a very [69] small segment of the consumer market and is not currently equipped to deal with the broad range of medical problems which occur in the adult population, Dr. Salkever testified that its licensed beds and patient days slightly overstate its competitive significance in the general acute care hospital services market (Tr. 2370, 2290).

d. *North Park Hospital*

291. North Park, the successor to Medical Park is a new, full-service hospital (Tr. 1758, 3398) whose location in the rapidly growing Hixson area makes it a much stronger competitor in the relevant market than its predecessor, Medical Park (Tr. 139–40; CX's 139Z–8 through Z–9, 29). North Park's occupancy rate was 85% during its first six months of operation (CX 119A). Medical Park's occupancy rate ranged only from 40–50% (Tr. 590; CX 15, p. 182). Thus, Dr. Salkever believes that North Park's present competitive position is somewhat stronger than is revealed in the 1981 market share data (Tr. 2373).

e. *Diagnostic Center*

292. Diagnostic Center does not compete with acute care hospitals in the relevant market for patients needing surgery (F. 33) but the services which it does offer are similar to those provided by Erlanger, Memorial and Parkridge (Tr. 1081).

3. Interfirm Behavior

a. *CON Proceedings*

293. Red Bank Community Hospital, located near Hixson, Tennessee, opposed Medical Park's CON application for relocation to that area (Tr. 588, 1985). An HCC representative attended one of Red Bank's board meetings and told the hospital that HCC was considering an antitrust lawsuit against Red Bank for its opposition to the CON but that if "you support us we can all work together and we can all share in the pie and everybody will be happy thereafter" (Tr. 1985–86; CX 288B; *see* CX 233A-B). Red Bank decided to withdraw its appeal of the CON and refrain from challenging it in court in return for assurances that an antitrust action would not be filed and for certain other concessions from HCC, embodied in a formal agreement entered into in May 1981 (Tr. 1987; CX 96A-F).

294. The agreement provided that both parties would refrain from recruiting each other's medical staff or employees (CX 96D; **[70]** Tr. 1987, 588; *see* CX 234B), and, further, that HCC would, for the next three years, support any CON application filed by Red Bank (CX 96C). Red Bank also agreed not to seek a CON for any psychiatric or nursing home facilities (CX 96C-D; Tr. 1987) and to support any HCC CON application related to the new hospital during the same time period (CX 96D).

295. The application of Medical Park to relocate to the Hixson area also generated joint conduct among opponents of the CON application. In response to a request by Mr. Smith, the HAI administrator of Red Bank (Tr. 1981; *see* Tr. 3719), HCA's administrator of Park-

ridge, David Dunlap, initially agreed to oppose the move. He drafted an opposition letter to the Health Systems Agency (Tr. 1981, 3326; CX 229A-B), but he decided not to send the letter because, he told Mr. Smith, HCA would probably end up owning North Park Hospital (Tr. 1981).

296. There are other examples of joint efforts regarding CON applications by hospitals in the Chattanooga area. One involved cooperative effort by Erlanger, Diagnostic and Parkridge to obtain approval of CON applications after individual applications by each of the firms were denied in 1979.[18] The three hospital administrators met with a representative of the local Health Systems Agency and presented a united front as to the need for new beds (CX 238A). Another proceeding, the recent CON application for a new hospital to be built in Collegedale, was cause for more discussions among hospital administrators about possible joint action. The proposal was discussed at a meeting of the Chattanooga Area Hospital District, where various administrators expressed their opposition to the new hospital (Tr. 231–32, 576), as well as at meetings of the health care task force (Tr. 234; CX's 588B, 589B). The administrators decided not to take a joint position on the application, however, for fear of possible FTC action (Tr. 232, 576), and the task force also decided to take no official position on the application (Tr. 234; CX 589B). Joint support for or opposition to other CON applications has been discussed among hospital administrators (Tr. 248–49, 575, 1982; *see also* Tr. 3719).

b. *Exchanges Of Information*

297. Several Chattanooga area hospitals have conducted rate surveys. HAI hospitals conducted semi-annual or quarterly surveys (Tr. 1060–61, 1958–59, 3599) of room rates and high volume ancillary department charges (Tr. 1959); the information was gathered by phone calls to administrators and other personnel [71] at other hospitals (Tr. 1958; CX 239A). Non-HAI hospitals have conducted similar surveys (*e.g.*, CX's 276A-E (Parkridge), 316I (Erlanger)).

298. Chattanooga area hospitals have also taken surveys to determine the wages that are being paid and benefits provided by their competitors (Tr. 210; CX's 163A-C, 237C, 519A-C, 520A-C, 521A-B, 522A-C, 523A-B, 524A-B, 525A-B, 526A-C; *see* CX's 227A, 237A). The information for these surveys was generally obtained by communications between hospital personnel departments (Tr. 210–11, 2006). Chattanooga area hospital administrators are members of the Chattanooga Area Hospital District, a subdivision of the Tennessee Hospital Association, which meets monthly (Tr. 230–31, 3325). Generally,

[18] The applications at issue were Erlanger's request for 14 beds (CX 238A; RX 1088 (4)), Diagnostic's request for 31 beds and Parkridge's request for 73 beds (CX 238A; RX 1088 (5)).

a representative from each area hospital attends each meeting (Tr. 231). Those meetings are an excellent setting for exchanging competitive information, and in fact they have at times served as a forum for discussions about hospital rates (Tr. 577). Some hospitals in the Chattanooga area have joint medical staff meetings (*e.g.,* Memorial and Erlanger; Tr. 247), and some administrators testified that they have casually discussed price information over the phone or in informal meetings (Tr. 209, 570–71).

4. HCA's Market Power

a. *Pricing Behavior*

299. The acquisitions give HCA control over three of the 11 hospitals in the relevant geographic market with a share of total net revenues of 18.2% (F. 281). While the increase in the HHI in this market is of concern (see Conclusions of Law), HCA's share of the market can hardly be said to confer on it "sufficient market power to influence the level of hospital prices in Chattanooga even without collusion with other firms" as argued by complaint counsel (CPF X 88); III Areeda & Turner, *Antitrust Law* ¶ 804 (1978).

b. *Foreclosure Of Competition For Referral Patients*

300. There are several types of patient referrals. "Outpatient" referrals are temporary visits of inpatients at one hospital to another hospital for outpatient testing (Tr. 615–16). In "inpatient" referrals,, an inpatient at one hospital (or a patient from the emergency room) is transferred for further inpatient treatment at another hospital (Tr. 123). For outpatient referrals, after the patient's physician orders a test, a nurse or other employee of the hospital usually decides which other hospital will be used (Tr. 616, 747, 1387–88, 3317, [72] 3343). For inpatient referrals, the physician usually decides which hospital should receive the patient (Tr. 645–46, 761).

301. Outpatient referrals may be influenced to some extent by a hospital administrator instructing employees to send patients to particular hospitals for care (Tr. 616–17, 1967); however, in the final analysis, this decision is made by hospital nursing personnel on the basis of patient convenience, quality, reliability, and speed of completion of the test (Tr. 3317–18; *see also* Tr. 747).

302. According to Dr. Salkever, administrators of hospitals, as demonstrated by research, have been able to influence patient length of stay, even though this has normally been the physician's decision to make, and he infers from this that administrators will be able to influence physician referral patterns in close cases where one hospi-

tal is not clearly preferable to one another (Tr. 2766–67, 2770, 2775, 2777).

303. Up to now, administrators have sought to redirect physician referral patterns in Chattanooga primarily through providing opportunities for social and professional contacts (Tr. 1106, 1148, 1386), but complaint counsel argue that HCA intended to influence referral patterns after the HAI acquisition and the announcement of the HCC acquisition (*see* Tr. 598–600). For example, Parkridge and Diagnostic were selected to participate in a "sister hospital" relationship (Tr. 3375, 3613; CX 400B), created by HCA to integrate newly-acquired and new managed hospitals into its system (CX 206C-D). The Parkridge-Diagnostic relationship entailed joint department head meetings (Tr. 3375, 3613).

304. Even beyond the sister relationship between Diagnostic and Parkridge, HCA set up a series of Chattanooga area administrators' meetings (Tr. 3321; CX 400A). At the first meeting, referrals were discussed, including the possibility of persuading physicians to utilize HCA hospitals (Tr. 600, 3380; CX 400B). Both Parkridge's open heart surgery plans and its CT scanner were mentioned (Tr. 1979; CX 400B). Several more administrators' meetings were held (Tr. 3321; CX's 400A, 625A-B), but referrals were no longer discussed, on advice of HCA counsel (Tr. 600–01). HCA also had plans after the acquisitions to undertake an area wide study "to coordinate and maximize HCA's potential growth in the Chattanooga area" (Tr. 602–03; CX 630). HCA Chattanooga area administrators attended a meeting to discuss the plan (CX 625A-B) and received a questionnaire to fill out to initiate the study (Tr. 610). The administrators were subsequently instructed not to complete the questionnaire, however, because of concerns about the FTC investigation (Tr. 612, 3797).

305. Inpatient referrals from Diagnostic to Memorial and Erlanger dropped off from 1981 to 1983, while referrals to Parkridge increased (CX 898A). Outpatient referrals from [73] Diagnostic followed the same pattern (CX 900A), and it is reasonable to conclude that the merger may have prompted physicians or hospital personnel to refer patients to affiliated hospitals.

306. There is no reason, however, to believe that such referrals were done for other than sound medical reasons. HCA hospital administrators denied that they could influence patient referrals (Tr. 3316, 3403–04), and an HCA memorandum on referrals recognized that physicians would still determine where the majority of referrals would take place (Tr. 600). While complaint counsel argue that such denials are "conclusory" (CPF X 107) I do not believe that HCA administrators would jeopardize their relationship with their medical staffs by insisting that they engage in a practice which might not be in the best

interest of their patients (Tr. 3316). Furthermore, I find no record support for complaint counsel's apparent claim that Chattanooga area medical personnel would subordinate their patients' needs to pressure by HCA administrators.

307. This is especially true in light of the paltry reward to HCA[19] even if such a scheme were successfully adopted, for discharges by HCA hospitals in the relevant market for referral to other hospitals, and referrals to HCA hospitals were not at all significant (RX 1086).

5. Expert Opinion

308. Dr. Salkever testified that, in the relevant market proposed by him, the MSA plus Bradley County (CX 646F, U), and using licensed beds and inpatient days as measures of market pressure, the post-acquisition HHI is in the highly concentrated range, approximately 2,200, and that the change in the index from pre- to post-acquisition, was "quite substantial," from 500–600 points (Tr. 2364–65).

309. The high, and substantially increased, post-acquisition concentration concerns Dr. Salkever because he believes that there are substantial entry and expansion barriers in the acute care hospital market in Chattanooga, and that this may lead to the independent exercise of market power by HCA hospitals in the market, or to collusive or interdependent behavior by Chattanooga area hospitals with respect to price or non-price competition (Tr. 2364–65, 2388–89). This fear is heightened by reference to past history in the market which, [74] Dr. Salkever believes, reveals a tendency to collusive or interdependent behavior (Tr. 2362).

310. Dr. Harris does not share Dr. Salkever's concern because he believes that post-acquisition concentration level in the Chattanooga MSA is comparable to that of other MSAs in the United States where competition is vigorous. In fact, Dr. Harris believes that most hospital markets in the United States are characterized by intense rivalry and no collusive behavior (Tr. 3905).

311. The degree of concentration in the Chattanooga MSA after the acquisition of HAI and HCC by HCA, as measured by the HHI, is lower than the average for comparable sized Metropolitan Statistical Areas (Tr. 3906; RX 1098). The HHI value for the Chattanooga Metropolitan Statistical Area after the acquisition of HAI and HCC by HCA was 1985, while the average HHI value for all MSA's at that time was 2530, more than 25% higher than the level for Chattanooga. Of the 70 metropolitan areas studied, 54—or almost 80% of the total —had a HHI level of market concentration above 2,000, which is higher than the Chattanooga MSA's HHI (RX 1098).

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[19] What a physician, as opposed to an HCA administrator, would gain by referring a patient to an inadequate medical facility—as complaint counsel fear—is difficult to imagine.

L. *Defenses*

1. Extensive Regulation

312. HCA cites as a "possible basis for immunity," the extensive government regulation of health care providers (RPF 642–62), but the Commission's recent decision in *AMI* at 12–17 so decisively rejected AMI's similar claim, that HCA's proposed findings on this point need not be considered.

2. Possible Benefits Of The Acquisitions

313. In the opinion of Mr. David G. Williamson, Jr., HCA's executive vice president, HCA has several strengths: Because of its widespread operations, it can attract highly qualified administrators who seek career advancement (Tr. 3249), as well as high quality personnel who enable HCA to develop system-wide approaches to hospital care which are unavailable to unaffiliated hospitals. HCA also enjoys superior access to capital (Tr. 3247–48), has had extensive experience in designing and building hospitals, and its size allows it to realize purchasing economies (Tr. 3247–48). Furthermore, hospital administrators can look to in-house specialists for assistance in dealing with problems facing them (Tr. 3247–48, 3418–20). **[75]**

314. These advantages allowed HCA to make substantial improvements to HCC's original plans for North Park Hospital (Tr. 3414–17) and, in the opinion of HCA personnel, have made both North Park and Diagnostic better competitors (Tr. 3418, 3602; *see also* Tr. 141).

315. The opinions expressed by HCA personnel, while entitled to some weight, are subjective and it is impossible to determine whether or not HCA's structure and personnel confer any more advantage on hospitals it now owns than did HAI or HCC on those hospitals. For example, HCA administrator Isaac Coe testified only that HCA provided management specialists to Diagnostic who were of "a little better" quality than those provided by HAI (Tr. 3617–18).

316. Furthermore, HAI, as does HCA, had its own in-house consultants (Tr. 1088–89; *see also* CX's 825A-J, 826A-F, 827A-J), and HCA resorts, or can resort to outside consultants (and presumably so can other acute care hospitals) when necessary (Tr. 3436, 3321–22; CX 347B-C).

317. Since there are almost 70 group purchasing organizations in the United States (RX 778 (38) – (44)), which are available to area hospitals, including the Tennessee Hospital Association group purchasing program (Tr. 252–53, 1566), there is no reason to believe that HCA is able to obtain any better prices from its suppliers than are available to individual hospitals which are members of such group buying organizations.

318. Whether or not HCA's designers produced a better North Park Hospital than HCC would have is a matter of dispute. While Jonathan Grimes, the present administrator of North Park testified that HCA had improved its heating and air conditioning systems and the traffic flow patterns of hospital departments, *inter alia,* over what HCC had planned for the new facility (Tr. 3413–17), Marvin Stern, Mr. Grimes' predecessor, believed that, while HCA did upgrade the air conditioning, this improvement reduced the space for ancillary services (Tr. 641–42). In any case, numerous independent firms that specialize in hospital design or construction are available to area hospitals (Tr. 3380–81). **[76]**

III. Conclusions of Law

A. *Jurisdiction*

Since complaint counsel's narrowest proposed relevant geographic market included areas of both Tennessee and Georgia, HCA, prior to the hearings, withdrew its third defense claiming that the Commission was without jurisdiction because of the absence of interstate commerce (Order Amending HCA's Answer (Nov. 8, 1983). Nevertheless, a short discussion of jurisdiction is warranted (CB, p. 5, n. 1).

While HCA, HAI and HCC were headquartered in Tennessee, all of these companies owned and managed hospitals in other states (F. 67, 70, 72), and they were therefore doing business in interstate commerce. *United States v. American Building Maintenance Industries,* 422 U.S. 271, 273, 275 (1975). These corporations were also engaged in interstate commerce through the receipt of federal Medicare and private insurance payments, the purchase of supplies and the treatment of patients from out of state (F. 68–69, 71, 73–74). *United States v. Hospital Affiliates International, Inc.,* 1980–81 CCH Trade Cas. ¶ 63,721 at 77,853 (E.D. La. Oct. 9, 1980).

Furthermore, because of the extensive involvement of HCA's, HAI's and HCC's Chattanooga area hospitals in interstate commerce, the acquisitions have affected and will affect interstate commerce, *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 744 (1976); thus, the jurisdictional requirements of Section 7 of the Clayton Act, 15 U.S.C. 18 (1982) and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982) are satisfied.

B. *The Relevant Product Market*

The "line of commerce"[20] in which the impact of a merger or acqui-

[20] Section 7 of the Clayton Act outlaws acquisitions whose effects may be substantially to lessen competition, or to tend to create a monopoly "in any line of commerce. . . ." 15 U.S.C. 18 (1982), as does Section 5 of the FTC Act. *AMI* at 17.

sition is measured should encompass products or services with "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all others. . . ." *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593–94 (1957). [77]

The problem of identifying those products or services which, in this case, possess such unique characteristics that they should be viewed as a "market" was also a central issue in the Commission's recent decision in a similar case, *AMI*.

The Commission recognized, *AMI* at 18, that the "controlling test" for defining the line of commerce is contained in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

In the very broadest sense, hospitals and other providers of medical services offer one product to the consumer—health care—but that phrase encompasses such a variety of services and prices for those services that it does not define with enough particularity the area within which particular health care providers compete. On the other hand, analyzing the individual services offered by providers does not further the inquiry because these services are often offered in combination.

In such cases, the courts and the Commission have adopted a "cluster of services" as the relevant product market. *AMI* at 19; *Grand Union Co.*, Docket No. 9121, slip op. at 19 (July 18, 1983) [102 F.T.C. at 1044]. When a cluster of services has enough peculiar characteristics—for example, commercial banking—this fact disproves the theory that other services might be interchangeable with them. *United States v. Philadelphia National Bank*, 201 F.Supp. 348, 363 (E.D. Pa. 1962), *aff'd*, 374 U.S. 321 (1963).

In *AMI*, the Commission listed the facts which it believed called for the conclusion that the cluster of services offered by general acute care hospitals was the relevant product market in that case and which set such hospitals apart[21] from other health care providers. *AMI* at 20.

The facts are no different in this case: The health care industry recognizes general acute care hospitals as distinct competitive entities (F. 84–89); state statutes require general acute care hospitals to

[21] *Compare Philadelphia National Bank*, 201 F.Supp. at 363.

> It is the conglomeration of all the various services and functions that sets the commercial bank off from other financial institutions.

provide the same cluster of services [78] (F. 82–83); and many medical procedures are only available at acute care hospitals (F. 77, 80–81).

The record in this case also establishes, as it did in *AMI*, that while other health care providers, either inpatient or outpatient, may offer services which are also offered by acute care hospitals, they are not realistic alternatives for the physician who admits his patients to acute care hospitals and would not constrain the exercise of market power by a combination of acute care hospitals.

Inpatient facilities such as nursing homes or providers of long-term psychiatric care do provide overnight and extended care, but they do not have the same equipment or personnel as acute care hospitals and do not serve the same patient population (F. 78, 98–105), and hospital administrators do not view them as competitors of acute care hospitals (F. 86–89). Finally, they could not, unless major renovations were made, begin to offer the same services as do acute care hospitals (F. 101, 105).

Outpatient providers such as doctor's offices and ambulatory surgery centers often offer the same services as do hospital emergency rooms, but they are offered in a different context.

Hospital emergency rooms probably deal with much more gravely ill patients than do other surgical facilities (F. 76, 78) and, for that reason, much emergency care in acute care hospitals is continued in the hospital's medical-surgical rooms, an indication that emergency room care is part of the cluster of services offered by hospitals.

Thus, the record in this case establishes, with no room for doubt, that general acute care hospitals provide a unique cluster of services to the physician and his patients which sets these hospitals apart from other health care providers. *See AMI* at 21:

> Although each individual service that comprises the cluster of general acute care hospital services may well have outpatient substitutes, the benefit that accrues to patient and physician is derived from their complementarity. There is no readily available substitute supplier of the benefit that this complementarity confers on patient and physician.

Despite their argument on behalf of the cluster concept, complaint counsel claim that some services should not be included in the relevant product market, *i.e.*, inpatient psychiatric care offered by acute care hospitals, emergency room care, and the pediatric beds at Erlanger Medical Center. I disagree with them: pediatric and psychiatric care offered by general acute [79] care hospitals are part of the cluster of services which they offer, and the beds dedicated to those services, including the ones at T.C. Thompson could, in addition, be converted to general medical-surgical use if that were desirable (F.

106–09), 122–24).[22] And, while acute care hospital emergency room service may differ from that offered by non-hospital outpatient facilities, hospitals compete with each other in offering this service, and it should not, therefore, be excluded from the acute care hospital market (F. 90–96), even though the Commission in *AMI* at 28 apparently concluded that inpatient revenue is the best measure of market presence.

Finally, while it is true, as HCA points out, that the types of surgical procedures which can be handled on an outpatient basis by surgicenters are increasing, this suggests only that the cluster of inpatient services offered by acute care hospitals is changing and does not indicate that hospitals are becoming head-to-head competitors with such outpatient providers.

C. *The Relevant Geographic Market*

The relevant geographic market within which the competitive effects of HCA's acquisitions should be measured is the "section of the country"[23] "where the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia National Bank,* 374 U.S.C. 321, 357 (1963).

The parties agree with authorities which have ruled on the question that acute care hospital markets are regional,[24] but disagree as to the extent of the area surrounding Chattanooga to which the purchaser of medical services can practicably turn for health care. *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *AMI* at 22–23.

Complaint counsel argue that the best geographic market is probably the MSA, but they also propose Hamilton County and the HSA as alternative geographic markets while HCA argues that the Chattanooga urban area—to which complaint counsel pose no serious objection—is the proper region for analysis of [80] competitive interaction in Chattanooga. To further muddy the waters, Dr. Salkever, complaint counsel's expert, agreed with neither side and put forward his favorite—the MSA plus Bradley County (F. 143), giving reasons which complaint counsel call "persuasive" (CB, p. 35).

The claim by the parties that several geographic markets for acute care hospital services exist in the Chattanooga area illustrates Dr. Salkever's warning that choosing the correct market is a matter of judgment (F. 144).

In my judgment, the most appropriate geographic market in this

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[22] Complaint counsel concede that this conclusion is true with respect to psychiatric facilities in acute care hospitals (CB, p. 14, n. 3).

[23] Section 7 of the Clayton Act, 15 U.S.C. 18 (1982).

[24] *United States v. Hospital Affiliates International, Inc.,* 1980–81 CCH Trade Cas. ¶ 63,721 (E.D. La. Oct. 9, 1980); *Robinson v. Magovern,* 521 F.Supp. 842 (W.D. Pa. 1981), *aff'd,* 688 F.2d 824, 881–82 (3d Cir.), *cert. denied,* 459 U.S. 971 (1982).

case is the one proposed by HCA—the Chattanooga urban area. I base my conclusion on two facts, the Elzinga-Hogarty test as applied to patient flow data and patient referral patterns.

The Chattanooga urban area is the smallest area which satisfies the Elzinga-Hogarty test—*i.e.*, both LOFI and LIFO in excess of 75%. Hamilton County does not satisfy this requirement, whereas the other suggested areas—the MSA, the HSA and the MSA plus Bradley County do.

Since the Chattanooga urban area is the smallest area to satisfy the test, it is, presumptively, the one which most accurately encompasses those hospitals to which area physicians and their patients can practicably turn to for health care, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *AMI* at 22–23, for the other areas add little to the LIFO percentage, or with the exception of the HSA (which adds 10%), only marginally more to the LOFI percentages (F. 182).

The Elzinga-Hogarty test is clearly useful in eliminating certain geographic areas from consideration as relevant markets, but it is not, at least in this case, an infallible guide to the area which is that market. The most that can be said is that Hamilton County is too narrow an area, and that the MSA, the MSA plus Bradley County and the HSA areas are probably too broad. The conclusion that the remaining area—Hamilton County plus Dade, Walker, and Catoosa counties in Georgia—most accurately defines the area within which Chattanooga acute care hospitals compete is, I believe, confirmed by the perceptions of area hospital administrators and by physician admitting patterns.

Administrators from downtown Chattanooga hospital do not regard outlying hospitals as competitors, and administrators of outlying hospitals do not regard themselves as competing with downtown Chattanooga hospitals (F. 176–80). These opinions are confirmed by HCA's study of admitting practices which reveal that physicians, who determine at which hospital their patients receive care, confine their admissions to hospitals within a limited geographic area, and that in this case, Chattanooga urban area physicians admit patients to hospitals within the area, and [81] seldom admit patients to outlying hospitals in Marion, Sequatchie, Bradley and other counties in the HSA (F. 147–57).

By the same token, physicians in outlying hospitals in these counties admit their patients to a single hospital or hospitals in those counties (as in Bradley County where there are two hospitals), but seldom admit them to Chattanooga urban area hospitals (F. 61–62, 158–62).

There are exceptions, of course. Patients from outlying areas who cannot receive specialized care will be admitted to Chattanooga hospi-

tals, but this does not mean that those hospitals compete with outlying hospitals; if that were the conclusion, then one would have to view hospitals from the entire Southeast who send gravely ill burn victims to Erlanger's burn unit or to other tertiary hospitals in Chattanooga as competitors of those hospitals (F. 163, 165–167). Considering all of the above facts, my judgment is that the most appropriate relevant geographic market in the case is the one proposed by HCA, *i.e.*, the Chattanooga urban area.

D. *The Effects Of The Acquisitions*

1. Post-Acquisition Evidence

Complaint counsel's prediction of the probable competitive effects of the challenged acquisitions is based, in part, on developments in the health care market which occurred or which became more significant after the challenged acquisitions took place.

Pointing to the general rule that only market conditions at the time acquisitions are made should be considered, HCA argues that I should ignore complaint counsel's claim that recent developments indicate that health care is becoming more price competitive (RAB, pp. 24–26).

I reject HCA's argument for two reasons: First, assuming that the phenomenon is significant, the claimed increase in price competition in the Chattanooga area can be seen as the result of long-term pre-acquisition developments. Second, the ban on post-acquisition evidence is not absolute. It may not be considered when the evidence is a result of voluntary actions by the acquiring firm, *United States v. General Dynamics Corp.*, 415 U.S. 486, 504–05 (1976); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 576 (1967), but it is appropriate to consider relevant post-acquisition evidence of industry-wide developments which the acquiring firm could not control. *AMI* at 42. [82]

2. Managed Hospitals

Complaint counsel's argument that competition in the Chattanooga urban area may be adversely affected by the HCA acquisitions is based, in part, on concentration figures which include the market shares of the managed hospitals, Red Bank and Downtown General, in their computation (CB, pp. 46–51).

Complaint counsel concede that Section 7 acquisitions usually transfer ownership to the acquiring company, but they claim that HCA's management of Red Bank and Downtown General resulted, in the words of the court in *United States v. Columbia Pictures,* 189 F.Supp: 153, 182 (S.D.N.Y. 1960), in a "transfer of a sufficient part of the bundle of legal rights and privileges from the transferring person

to the acquiring person to give the transfer economic significance and the proscribed adverse 'effect.' "

The effect of the management contracts, according to complaint counsel, is equivalent to ownership because HCA obtained the ability to direct the operations of these hospitals (CB, p. 47). I do not agree.

Complaint counsel rely, to some extent, on HAI's prior long-term contracts with the hospitals (F. 196–99); these contracts were, however, renegotiated before the acquisition of HAI and, under them, the boards of directors control the hospitals' activities.

HCA has no present power to control the activities of Red Bank, for termination of the management agreement was initiated by its board when it learned that HCA planned to acquire HCC. After some initial reluctance, HCA agreed to terminate the management contract (F. 213–14).

The present contract with Downtown General is similar to other HCA contracts for the management of hospitals. Its term is for four years and calls for a fixed management fee, so that HCA has no interest—other than to satisfy the board—in increasing revenues. Furthermore, Blue Cross had determined that [83] under the new contracts, HAI and Downtown General were not "related persons" (F. 198–99, 201)[25]

While the HCA administrator at Downtown General conducts its day-to-day activities (F. 202), its management contract and testimony at the hearings reveal that the board establishes the hospital's financial and health care objectives and expects management to carry them out (F. 202–08), and would not hesitate to dismiss an administrator who ignored its policies and, instead, attempted to further the objectives of HCA. In short, complaint counsel have not established that HCA dominates or controls the board of directors of Downtown General.

Complaint counsel suggest that even though the board of directors of the managed hospitals actually control them, they might be unaware of collusive agreements by administrators of HCA-owned and HCA-managed hospitals (CB, p. 51), but speculation of this sort, unsupported by record evidence, does not justify treating HCA managed hospitals the same as owned hospitals for purposes of analyzing the competitive impact of the challenged acquisitions.[26]

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[25] Medicare regulations define an entity as "related to [the] provider" if the provider "to a significant extent is associated or affiliated with or . . . is controlled by the organization furnishing the services." Control is defined as "the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization." 42 C.F.R. 405.427(b)(1), (3) (1980).

[26] Beyond making the claim, complaint counsel do not reveal how HCA's ownership of the land under Downtown General and the adjacent physicians' office building give it such leverage that it could dictate policy to the board of directors of that hospital.

3. Concentration

HCA's acquisitions in the relevant geographic market eliminated two competitors, Diagnostic and Medical Park and, using the measure which I believe most accurately reflects competitive activity in the market, total net revenues, they raised the HHI from 2344 to 2495. HCA's share of total net revenues before the acquisition was 12.9%. The HAI acquisition raised its share by 2.9% to 15.8%. The HCC acquisition raised its share an additional 2.4% to 18.2% (F. 281). [84]

HCA claims that these market shares are modest "by any standard" especially those existing in the acute care hospital industry (RB, p. 58) where, according to Dr. Harris, vigorous competition exists in many MSA's with much higher HHI numbers (F. 310–11). Complaint counsel respond that "even under HCA's market calculations in its preferred geographic area using its preferred measure, total net revenues," the acquisitions are of concern under the Justice Merger Guidelines (CAB, pp. 5–6).

Dr. Harris' comments on the vigor of competition in other MSAs should not, in my opinion, be considered in deciding whether the acquisitions in the Chattanooga urban area are unlawful, for they are conclusions which are not based on facts of record in this case.

Furthermore, his conclusion is contrary to the widely accepted theory that high market concentration leads to a lessening of competition; for example, the Justice Merger Guidelines emphasize the importance of increases in concentration caused by horizontal mergers: "Other things being equal, concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power" (§ 3.1). As a guide to the prediction of anticompetitive consequences of such mergers, the Department relies on the HHI. The HCA acquisitions resulted in a post-merger HHI of well over 1800, and the increase in the index was over 100 points. According to the Justice Merger Guidelines, § 3.11(c):

> Markets in this region (a Herfindahl Index over 1800) generally are considered to be highly concentrated. Additional concentration resulting from mergers is a matter of significant competitive concern. The Department is unlikely, however, to challenge mergers producing an increase in the HHI of less than 50 points. The Department is likely to challenge mergers in this region that produce an increase in the HHI of more than 50 points, unless the Department concludes, on the basis of the post-merger HHI, the increase in the HHI, and the presence or absence of the factors discussed in Sections 3.2, 3.3, 3.4, and 3.5 that the merger is not likely substantially to lessen competition. However, if the increase in the HHI exceeds 100 and the post-merger HHI substantially exceeds 1800, only in extraordinary cases will such factors establish that the merger is not likely substantially to lessen competition.

Although not as large as the HHI in the relevant market proposed

by Dr. Salkever (F. 308), the HHI in the Chattanooga urban area substantially exceeded the 1800 standard, both before [85] and after the acquisitions, and this and the increase in concentration brought about by the acquisitions, is a persuasive indication that they may substantially lessen competition.[27] The inquiry into probable competitive consequences cannot, however, be limited to consideration of the HHI numbers, for such qualitative factors as the market's "structure, history, and probable future" must also be considered. *Brown Shoe Co. v. United States,* 370 U.S. 294, 322 n. 38 (1962). Indeed, the Commission insists that such factors are of more importance to merger analysis than market concentration figures:

> Both the Justice Guidelines and Commission Statement[28] reflect the importance of considering both quantitative and qualitative elements of the acquisition. Although the Commission has expressed an intent to give "considerable weight" to the Justice Guidelines, it has not endorsed either the analytical approach or the numerical thresholds and tests for analyzing mergers contained in the Justice Guidelines. *AMI* at 27.

Although it rejected reliance on the numerical analysis of mergers, the Commission in *AMI* noted that the acquisition under consideration increased the HHI from 3818 to 6025 in the county market and from 4370 to 7775 in the city market and stated that these figures "tell a revealing story of the competitive conditions within those markets." *AMI* at 28. [86]

The post-acquisitions HHI, and the increase in the HHI in this case is much smaller, but it is at a level which causes, according to the Justice Merger Guidelines, "great competitive concern" and this fact, together with the qualitative considerations discussed below leads me to believe that the HCA acquisitions may[29] substantially lessen competition because they will enhance the ability of firms in the market "to collude, either expressly or tacitly." *FTC Merger Statement* at 2.

4. Health Planning Laws

HCA argues that the market share figures present in this case—which are "the primary index of market power" *Brown Shoe* at 322 n. 38—should be ignored because Congress, by adopting the National Health Planning and Resources Development Act of 1974, has determined that acquisitions in the acute care hospital industry should not

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[27] *AMI* at 25; *United States v. Philadelphia National Bank,* 374 U.S. 321, 363 (1963):

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

[28] Announcement of Policy: Federal Trade Commission Announces Horizontal Merger-Enforcement Policy, *reprinted in* CCH Trade Reg. Rep. (No. 546), June 16, 1982 ("FTC Merger Statement").

[29] In *Brown Shoe* at 323, the court stated that "Congress used the words *may be* substantially to lessen competition (emphasis supplied), to indicate that its concern was with probabilities, not certainties."

be judged "by the singleminded standard of their effect or competition" (RB, p. 118), but the Commission has concluded that the health care industry operates like other industries and, for purposes of antitrust analysis, should not be treated any differently:

> . . . the record clearly demonstrates that price constraints influence the decisions made by both buyers and sellers. . . . Second, AMI's argument that market share evidence is valuable only in cases involving "manufacturing and related industries in which normal market forces can reasonably be assumed to operate" is contrary to both common sense and case law precedent. *AMI* at 26.

5. Collusion

The increase in the HHI caused by HCA's acquisitions, which by themselves suggest the likelihood of collusive behavior, do not reveal the strengths and weaknesses of acute care hospitals in the Chattanooga urban area. A consideration of these factors indicates that HCA's market share data does not fully measure its competitive strength, for North Park is thought by its competitors to be in an ideal location and its present occupancy rate of around 85% is much higher than that of its predecessor, [87] Medical Park, with the result that the 1981 market data understates North Park's competitive significance (F. 291). Conversely, the market shares of Erlanger and Tri-County somewhat overstate their competitive strength because of their obligation to treat indigent patients (F. 283–89).

It might be argued that if competitive weaknesses of acute care non-HCA hospitals in the market are considered, then Diagnostic is at a significant disadvantage, for it has no surgical facilities, but this position is similar to the one complaint counsel have used to justify exclusion of T.C. Thompson's pediatric beds. The fact is that Diagnostic, like T.C. Thompson, is a highly-specialized, well-regarded hospital which is a significant competitor in the services which it does offer (F. 33).

The inference from market data that collusive behavior is more probable after the HCA acquisitions in the Chattanooga urban area is strengthened by consideration of the history of interfirm behavior in this market. *FTC Merger Statement* at 8.

Dr. Salkever testified that hospitals have historically banded together to solve joint problems and that the risk of collusion is therefore high (F. 309), and the Chattanooga area has experienced a similar history. Some area hospital have exchanged price data for their rate surveys, as well as wage data (F. 297–98), and HCC and Red Bank Hospital entered into an anticompetitive market allocation agreement in 1981 (F. 293–94). Hospital administrators have also joined in

opposing CON applications which they perceive as competitive threats (F. 295–96).

New entry—or the fear of it—can dilute market power; conversely, high entry barriers can "exacerbate any market power conferred by the merger." *AMI* at 27. In *AMI,* the Commission found that barriers to entry caused by CON requirements were "very high" and that because of excess capacity, which also exists in the Chattanooga area (F. 263), new entry was extremely unlikely. *AMI* at 29.

Complaint counsel make the same argument here, but if they mean to suggest that barriers are so high that new entry will not occur even if there is a need for an increase in capacity, I do not agree with them. The most reliable evidence indicates that if the planning authorities agree that a need exists, new facilities or additions to existing ones will be approved (F. 265–68). However, it is apparent that CON requirements erect a time barrier to entry, and that it is high (F. 271–77). Hospitals already in the market can oppose new entry and the entire process of approval could, conceivably, take many years. [88] This means, as a practical matter, that new entry or expansion would not be a significant constraint on the exercise of market power by existing acute care hospitals in the Chattanooga urban area.

Collusive behavior by acute care hospitals in the Chattanooga urban area would impair the significant competition for patients and physicians which now exists (F. 222–24). There has been little price competition among acute care hospitals in the past (F. 221) and, despite the great public outcry about the enormous cost of health care, I do not share complaint counsel's belief that price competition among acute care hospitals will increase dramatically in the future; however, there is some reason to believe that price competition will be more intense in the future than it has been in the past (F. 241–51). Nevertheless, the attentuated price competition which does exist or which will exist should be protected:

> . . . even assuming that the limited price competition that does exist in these markets may produce only marginal benefits in terms of overall consumer welfare, the antitrust laws will endeavor to protect this price competition if, for nothing else, the hope that price competition will be enhanced. *AMI* at 32–33.

See also Stanley Works v. FTC, 469 F.2d 498, 505 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973).

HCA sees little possibility of collusion among acute care hospitals in the Chattanooga area because of the enormous variety of services which they offer, the complexity of their prices, differences in their costs, the antipathy between non-profit and for-profit hospitals, and the presence of third party payors who must approve hospital charges to subscribers (RB, pp. 77–87).

These factors would undoubtedly make it more difficult for Chattanooga area hospitals to collude, but they could agree on pricing formulas, F. Scherer, *Industrial Market Structure and Market Performance* 170 (2d ed. 1980), and could present Blue Cross with a concerted request for rate increases. In fact, because there is such great public pressure to reduce hospital costs, it would be to their mutual advantage—whether they are for-profit or non-profit—collectively to resist such pressures. *Compare Michigan State Medical Society,* 101 F.T.C. 191, 285–86 (1983). [89]

6. Efficiencies

The efficiencies which the integration of North Park and Diagnostic into HCA will bring to those hospitals—taking HCA's predictions at face value (F. 314–15)—are, it seems to me, attainable by other area hospitals. Assuming a need for expansion or new entry, financing should not be an insurmountable problem, lower prices can be obtained by affiliation with hospital buying groups (F. 317), and management firms can supply the same level of expertise to single hospitals as HCA does to its owned hospitals (F. 316); in fact, hospital trustees can obtain the same benefits as HCA-owned hospitals by hiring HCA as a manager.

Assuming, however, for the moment, that HCA's acquisition of Medical Park and Diagnostic has given them a slight competitive edge over other hospitals, I find it impossible to determine whether this edge outweighs the universally-assumed competitive harm which a significant increase in concentration in a market which is highly concentrated will probably cause. Indeed, it is arguable that past Supreme Court decisions have actually viewed as repugnant the concept that mergers may be efficient. *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962); *United States v. Philadelphia National Bank,* 374 U.S. 321, 371 (1963); *FTC v. Procter & Gamble Co.,* 386 U.S. 568 (1978).

After considering the "dicta" in these cases, *AMI* at 47, the Commission rejected the concept that efficiency should be viewed with suspicion and, along with other recent cases, recognized operating and scale efficiencies as one factor to consider in analyzing the competitive impact of a merger. However, the Commission also emphasized that such efficiencies must be established by substantial evidence. *AMI* at 51.

HCA has not presented such evidence. The efficiencies which might result from the acquisitions of North Park and Diagnostic are, at best, minimal and could conceivably be realized by their competitors. Most significant, however, is HCA's failure to establish that the predicated efficiencies would be of such a magnitude as to "warrant their consid-

eration as a procompetitive effect and to be balanced against the anticompetitive impact" of the acquisitions. *AMI* at 53.

While HCA may believe that hospitals are better run on a decentralized basis and that the separate identities of North Park and Diagnostic will be maintained (RB, p. 101), I assume that, if cooperation is more beneficial than confrontation, the managers of these hospitals will cooperate. [90]

7. Conclusion

The argument that HCA's hospital acquisitions should not be judged by their effect on competition was rejected by the Commission in *AMI,* which applied the usual antitrust standards to acquisitions in the acute care hospital market. Those standards require, in this case, an order which divests the hospitals which HCA acquired in the Chattanooga urban area, for the acquisitions of Diagnostic and Medical Park (now North Park) hospitals eliminated two competitors in a "highly concentrated" market, and increased the HHI by over 100 points. Consideration of other factors such as the quality of competitors in the market, the high time barrier to new entry or expansion and the past interdependent behavior of Chattanooga area hospitals lead to the conclusion that the acquisitions may contribute to a market structure in which collusive behavior with respect to service or price is a significant risk.

IV. Summary

A. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over HCA.

B. HCA was, at all times relevant herein, a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

C. HAI was, at all times relevant herein, a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

D. HCC was, at all times relevant herein, a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

E. The challenged acquisitions are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

F. The appropriate product market within which to evaluate the competitive effects of the challenged acquisitions by respondent is inpatient and outpatient acute care hospital services.

G. The appropriate geographic market within which to evaluate the competitive effects of the challenged acquisitions by respondent is the Chattanooga urban area, consisting of Hamilton County, Tennessee and Dade, Walker and Catoosa Counties, Georgia.

H. The effect of the acquisition of HAI by HCA has been or may be

substantially to lessen competition, or to tend to create [91] a monopoly, in the relevant product and geographic markets, in violation of Section 7 of the Clayton Act, as amended, and the acquisition is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, as amended.

I. The effect of the acquisition of HCC by HCA has been or may be substantially to lessen competition, or to tend to create a monopoly, in the relevant product and geographic markets, in violation of Section 7 of the Clayton Act, as amended, and the acquisition is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, as amended.

7. The order entered is appropriate and necessary to remedy the violations of law which have been found to exist.

V. Order

An appropriate order in this case must require, as a minimum, the divestiture of those hospitals whose acquisition I have found unlawful, Diagnostic Hospital and Medical Park (North Park). Also, since it is important for hospitals to own or control adjacent office buildings to attract physicians who will admit their patients to the nearby hospital, the order should require the divestiture of such facilities so that the hospitals' new owners will have the benefit of controlling the use of these important adjuncts.

Complaint counsel also urge that the order require HCA to obtain prior Commission approval before acquiring any acute care hospital (through purchase, lease, management contract, or otherwise) in the relevant geographic market (which I have decided is the Chattanooga urban area) and in other areas where horizontal acquisitions may create significant anticompetitive consequences (CB, pp. 111–18). They seek prior notice requirements in other instances (CB, pp. 118–21).

The Commission in *AMI* accepted a prior notice requirement which would enable it "to investigate an acquisition that appears to involve significant antitrust problems." *AMI* at 60. Complaint counsel's proposed order provision has the same purpose, and is not such a burdensome requirement that it would adversely affect HCA's business endeavors. It will be included in the order which I enter.

The Commission in *AMI* rejected a prior approval requirement because, even though there appeared to be a trend toward increased consolidation, it could not, on the record before it, "assume that acquisitions in this industry, *per se,* are anticompetitive." The Commission also found that AMI's presence as a potential purchaser of local hospitals has a substantial procompetitive impact, and that a prior approv-

al requirement might eliminate AMI as a potential competitor. *AMI* at 59–60. [92]

Complaint counsel argue that their proposed order would require prior approval only in these markets where high concentration exists, where the acquisition would increase concentration by more than 100 HHI points, where there are high barriers, and where the purchase price is more than one million dollars (CB, p. 113). While this proposal is in line with the recent Justice Department guidelines, it would not consider any of the qualitative factors which the Commission believes are as important as quantitative ones in analyzing the competitive impact of a merger. One of these qualitative factors is the increased competition which complaint counsel insist is occurring and will continue in the acute care hospital market. A prior approval notification would, therefore, not only impose a substantial burden on HCA,[30] but it would also ignore the significant changes which, according to complaint counsel, are now occurring in the acute care hospital market.

In addition to deleting the prior approval provision of complaint counsel's order, I have eliminated the words "or management contract" from the proposed order (I.E.; I.F.); changed the definition of the relevant geographic market from the Georgia-Tennessee HSA to the Chattanooga Urban Area (I.H.); changed the basis for calculating the Herfindahl-Hirschman Index from state-licensed acute care hospital beds to total net revenue (I.J.; V); and, eliminated all requirements with respect to South Pittsburgh Community Hospital and Downtown General Hospital since the former is not located in the relevant geographic market and the latter is not controlled by HCA. I have also eliminated the proposal with respect to Sequatchie General Hospital.

Therefore, the following order is appropriate: [93]

ORDER

I.

Definitions

For purposes of this order the following definitions shall apply:

A. *HCA* means Hospital Corporation of America, a corporation organized under the laws of Tennessee, with its principal executive

[30] *Compare AMI* at 60:

> Notwithstanding Complaint Counsel's arguments and Judge Barnes' findings to the contrary, we believe that time is of the essence in negotiations for the purchase of local hospitals, and that the ability to make a purchase commitment with some degree of certainty of obtaining the necessary regulatory approval, is an important element in this negotiating process. The prior approval requirement would uniquely disable AMI in these negotiations.

office at One Park Plaza, Nashville, Tennessee, and its directors, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. *HAI* means Hospital Affiliates International, Inc.

C. *County* also includes a county equivalent, such as a parish in Louisiana.

D. *Acute care hospital,* herein referred to as "hospital," means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, as well as outpatient services, and which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. *Acquire any hospital* means to directly or indirectly acquire all or any part of the stock or assets of any acute care [94] hospital, or enter into any arrangement by which HCA obtains direct or indirect ownership or control of any acute care hospital or any unit of such hospital, including a lease of any such hospital or unit of such hospital.

F. *Operate a hospital* means to own or lease an acute care hospital.

G. *MSA* and *PMSA* mean, respectively, a Metropolitan Statistical Area, and a Primary Metropolitan Statistical Area, as defined as of July 1, 1983, by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

H. The *Chattanooga Urban Area* means that geographic area comprising Hamilton County, Tennessee and Dade, Walker and Catoosa counties in Georgia.

I. *Person* means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

J. *HHI* means the Herfindahl-Hirschman Index of market concentration as calculated in accordance with the procedures specified in Section 3 of the Merger Guidelines of the United States Department of Justice (revised June 14, 1984) for acute care hospitals in a defined geographic area, based on each hospital's total net revenue.

II.

A. *It is ordered,* That, within twelve (12) months from the date this order becomes final, HCA shall divest, absolutely and in good faith, at no minimum price: [95]

(1) North Park Hospital in Hamilton County, Tennessee, and all

assets, properties, lands, licenses, leases, and other rights and privileges in connection with the hospital, both tangible and intangible. The divestiture required by this provision of this order specifically shall include any medical office building owned by HCA that is adjacent to, affiliated with, or operated in connection with, North Park Hospital, as well as the plot of land on which each such medical office building is situated. The purpose of this divestiture is to establish North Park Hospital as a viable competitor, and to restore competition in the area. The divestiture shall be subject to the prior approval of the Federal Trade Commission;

(2) Diagnostic Center Hospital in Hamilton County, Tennessee, and all assets, properties, lands, licenses, leases, and other rights and privileges in connection with the hospital, both tangible and intangible, that HCA acquired from HAI, together with any subsequent improvements in, or additions to, any such assets or properties. The divestiture required by this provision of this order [96] specifically shall include any medical office building owned by HCA that is adjacent to, affiliated with, or operated in connection with, Diagnostic Center Hospital, as well as the plot of land on which each such medical office building is situated. The purpose of this divestiture is to reestablish Diagnostic Center Hospital as a viable competitor, and to restore competition in the area. The divestiture shall be to a person other than the person to whom divestiture is made under Section II., paragraph A. (1) of this order, and shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, HCA shall take all measures necessary to maintain North Park Hospital and Diagnostic Center Hospital in their present conditions and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested, so as not to impair the present operating abilities or market value of the hospitals or the other assets to be divested.

III.

A. If HCA has not divested all of the properties, assets, or enterprises required to be divested pursuant to Section II of this order within the 12-month period provided therein, the Federal Trade Commission may select a trustee to effect any ordered divestitures yet to be accomplished. The trustee shall [97] be a person with experience and expertise in acquisitions and divestitures. If the Federal Trade Commission should elect to appoint a trustee, it shall not be precluded from seeking civil penalties and other relief available to it for any failure by HCA to comply with this order. If the Federal Trade Commission should not elect to appoint a trustee under this Section III of

this order, it shall not be precluded from seeking civil penalties, the appointment by the courts of a trustee to effect the divestitures, and other relief available to it, for any failure by HCA to comply with this order.

B. Any trustee appointed by the Federal Trade Commission pursuant to this Section shall have the following powers, authority, duties, and responsibilities:

1. The trustee shall have the exclusive power and authority to divest any properties, assets, or enterprises required to be divested pursuant to Section II of this order that have not been divested by HCA within the time period for the divestitures provided therein. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures, which shall be subject to the prior approval of the Federal Trade Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan [98] of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Federal Trade Commission. In addition, any delays in divestiture caused by HCA shall extend the time for divestiture in accordance with the delay caused.

2. The trustee shall have full and complete access to the personnel, books, records and facilities of any property, asset, or enterprise that the trustee has the duty to divest, and HCA shall develop such financial or other information relevant to the properties, assets, or enterprises to be divested as such trustees may reasonably request. HCA shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

3. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price, and the purposes of the divestitures as stated in Section II of this order. [99]

4. The trustee shall serve, without bond or other security, at the cost and expense of HCA on such reasonable and customary terms and conditions as the Federal Trade Commission may set. The trustee shall have authority to retain, at the cost and expense of HCA, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestitures. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Federal Trade Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to HCA and the trustee's power shall

be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

5. HCA shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, [100] the trustee's duties under this order, unless the Federal Trade Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the willful or wanton acts or bad faith of the trustee.

6. Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, HCA shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this Order, execute a trust agreement that transfer to the trustee all rights and powers necessary to permit the trustee to cause the divestitures.

7. If the trustee ceases to act or fails to act diligently, the Federal Trade Commission shall appoint a substitute trustee.

8. The trustee may ask the Federal Trade Commission to issue, and the Federal Trade Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the divestitures required under this order. [101]

9. The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, or enterprises required to be divested pursuant to Section II of this order.

10. The trustee shall report in writing to HCA and the Federal Trade Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, HCA shall notify the Federal Trade Commission at least thirty (30) days prior to HCA's acquiring any hospital, as defined in this order, if:

A. The hospital to be acquired is within a Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") in which HCA already operates a hospital, or would operate two or more hospitals as a result of two or more simultaneous acquisitions from different persons, and: (1) the hospitals operated or to be operated by HCA after the acquisition(s) would have a combined share of twenty (20) percent or more of the total net revenues of the state-licensed acute care hospitals in the MSA or PMSA; or (2) the HHI in the MSA

or PMSA would be between one thousand (1000) and eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in the MSA or PMSA by more than one hundred (100) points; or (3) the HHI in the MSA or PMSA would be greater than **[102]** eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in the MSA or PMSA by more than fifty (50) points; or

B. The hospital to be acquired is not within an MSA or PMSA but is in a county in which HCA already operates a hospital, or would operate two or more hospitals as a result of two or more simultaneous acquisitions from different persons, and: (1) the hospitals operated or to be operated by HCA after the acquisition(s) would have a combined share of twenty (20) percent or more of the total net revenues of the state-licensed acute care hospitals in the county; or (2) the HHI in the county would be between one thousand (1000) and eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in the county by more than one hundred (100) points; or (3) the HHI in the county would be greater than eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in the county by more than fifty (50) points; or

C. The hospital to be acquired is not within an MSA or PMSA but is within thirty (30) miles of a hospital which HCA already operates in another county, or would operate in another county as a result of two or more simultaneous acquisitions from different persons, and: (1) the hospital to be acquired and any hospital(s) that HCA operates or will operate subsequent to the acquisition(s) have a combined share of twenty (20) percent or more of the total net revenues of the state-licensed acute care hospitals in the area within thirty (30) miles of the midpoint between any hospital to be acquired and any other hospital **[103]** operated or to be operated by HCA; or (2) the HHI in the area within thirty (30) miles of the midpoint between any hospital to be acquired by HCA and any other hospital operated or to be operated by HCA would be between one thousand (1000) and eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in that area by more than one hundred (100) points; or (3) the HHI in the area within thirty (30) miles of the midpoint between any hospital to be acquired by HCA and any other hospital operated or to be operated by HCA would be greater than eighteen hundred (1800) after the acquisition(s), and the acquisition(s) would raise the HHI in that area by more than fifty (50) points.

The notification required of HCA by this Section IV of this order shall not require additional notification by HCA to the Federal Trade Commission of any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act,

15 U.S.C. 18a. The notification required of HCA by this Section IV of this order shall include such information and be in such form as is required of the acquirer for notification of an acquisition made pursuant to Section 7A of the Clayton Act and any rules promulgated thereunder. Furthermore, any acquisition subject to this Section IV of this order, involving an arrangement to lease a hospital, shall be fully described in the notification regardless of whether the acquisition involves acquisition of any stock or assets of a hospital. With respect to any acquisition of a hospital that is subject to this Section IV of this order, [**104**] provisions and requirements identical to those provisions and requirements of paragraphs (a), (b), and (e) of Section 7A of the Clayton Act, and any rules promulgated thereunder, that relate to prohibition of an acquisition prior to expiration of the waiting period, waiting period duration, termination of waiting period, extension of waiting period, and submission of additional information, shall apply, insofar as they relate to the Federal Trade Commission.

Provided, however, that no acquisition of a hospital by purchase shall be subject to this Section IV of this order if the consideration to be paid for the acquisition of the hospital or any rights or interest therein, including assumption by HCA of any liabilities of its present owners, does not exceed one million dollars ($1,000,000).

V.

It is further ordered, That HCA shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Section II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may request, a summary of all contacts and negotiations with potential purchasers of the stock, assets, or other rights or interests to be divested under this order, the identity and [**105**] address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

HCA shall submit such further written reports as the staff of the Federal Trade Commission may, from time to time, request in writing to assure compliance with this order.

VI.

It is further ordered, That HCA, upon written request of the Secretary of the Federal Trade Commission or the Director of the Bureau of Competition of the Federal Trade Commission made to HCA at its principal office, for the purpose of securing compliance with this order, and for no other purpose, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Federal Trade Commission or the Director of the Bureau of Competition:

(1) reasonable access during the office hours of HCA, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in HCA's possession or control that relate materially and substantially to any matter contained in this order; and

(2) an opportunity, subject to the reasonable convenience of HCA, to interview officers or employees of HCA, who may have counsel present, regarding such matters. [106]

VII.

It is further ordered, That HCA shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this order.

Opinion of the Commission

By Calvani, *Commissioner:*

I. INTRODUCTION TO THE CASE

A. *The Acquisitions*

In August 1981, Respondent Hospital Corporation of America ("HCA"), the largest proprietary hospital chain in the United States, acquired Hospital Affiliates International ("HAI") in a stock transaction valued at approximately $650 million. I.D.F. 1,6.[1] At the time of

[1] The following abbreviations are used in this opinion:

I.D. – Initial Decision page number
I.D.F. – Initial Decision Finding of Fact number
CX – Complaint Counsel's Exhibit number
RX – Respondent's Exhibit number
CAB – Complaint Counsel's Appeal Brief
RAB – Respondent's Brief on Appeal from Initial Decision

(footnote cont'd)

the acquisition, HAI owned or leased 57 hospitals and managed 78 hospitals nationwide. I.D.F. 6. Prior to its acquisition by HCA, HAI owned or managed five acute care [4] hospitals in the general area of Chattanooga, Tennessee, and HCA acquired ownership or management of these hospitals through the transaction. Some four months later HCA acquired yet another hospital corporation, Health Care Corporation ("HCC"), in a stock transaction valued at approximately $30 million. I.D.F. 8. At the time of the acquisition, HCC owned a single acute care hospital in Chattanooga. These two transactions provide the genesis for the instant case.

As a result of the HCA-HAI acquisition, Respondent increased its hospital operations in Chattanooga and its suburbs from ownership of one acute care hospital to ownership or management of four of the area's eleven acute care hospitals. Within the six-county Chattanooga Metropolitan Statistical Area ("Chattanooga MSA"), HCA changed its position from owner of one hospital to owner or manager of six of fourteen acute care hospitals. With the acquisition of HCC, HCA obtained yet another acute care hospital in Chattanooga. Thus, HCA became owner or manager of five of the eleven acute care hospitals within the Chattanooga urban area and seven of the fourteen in the Chattanooga MSA.

On July 30, 1982, the Commission issued a complaint charging that the effect of HCA's acquisitions of HAI and HCC, both together and separately, may be substantially to lessen competition or to tend to create a monopoly in the acute care hospital services market[2] in the Chattanooga, Tennessee area in [5] violation of Section 7 of the Clayton Act, 15 U.S.C. 18 (1982), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982). Judge Parker issued his Initial Decision on October 30, 1984. He found that the acquisitions violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and ordered HCA to divest two of the hospitals of which it had acquired ownership. Judge Parker also ordered that HCA provide prior notification to the Commission of certain of its further hospital acquisitions. HCA appeals the Initial Decision on several grounds; Complaint Counsel appeal certain of Judge Parker's findings as well.

CAnB – Complaint Counsel's Answer to Respondent's Appeal Brief
RAnB – Respondent's Brief in Response to Complaint Counsel's Appeal Brief
CRB – Complaint Counsel's Reply to Respondent's Brief in Response to Complaint Counsel's Appeal Brief
RRB – Respondent's Reply Brief on Appeal from Initial Decision

Transcript citations are given by the last name of the witness and the transcript page on which the testimony appears.

[2] Originally, the complaint alleged that the acquisition may substantially lessen competition or tend to create a monopoly in the inpatient psychiatric treatment services market as well. Compl. para. 21–28. Upon motion of Complaint Counsel, the Administrative Law Judge ordered this count dismissed from the complaint. *See* I.D. at 3. The count forms no part of the instant proceeding.

The Commission recently considered the legality of a hospital merger in the matter of *American Medical International, Inc.*, No. 9158 (July 2, 1984) [104 F.T.C. 1]. In that case, we confronted some difficult questions concerning the application of the antitrust laws to mergers in the hospital industry. Here, we face some equally difficult questions regarding the nature of competition and anticompetitive behavior among hospitals. We affirm Judge Parker's finding of liability and modify his opinion only as stated below.

B. *The Structure of Health Care Markets*

Both parties agree that the health care industry is unique in some respects. Before considering the merits of this case, it [6] is important to have a fundamental understanding of the role of physicians and third-party payors in the health care transaction.

The role of the physician is a market response to the extremely high cost to consumers of health care information and expertise. As a result of the patient's grossly imperfect information concerning proper diagnosis and treatment, and the doctor's much greater knowledge, the doctor decides what diagnoses, treatments, and so forth the patient will have. *See, e.g.*, Harris 3832. The physician orders tests, prescribes drugs and courses of treatment, and so forth, and most important for our analysis, decides whether and when a patient will be admitted to and discharged from a hospital, along with the battery of tests and procedures he receives while there. *See id.* The patient simply cannot decide these things for himself; the doctor is his repository of information and expertise and thus plays the critical role in determining the nature and extent of hospital and other health services the patient will receive.

In addition to a lack of information about how to diagnose and treat himself, the patient has perhaps even less perfect information about the occurrence and extent of future illness and injury. For the most part, neither the doctor nor the patient can control frequency or intensity of disease or injury. For example, the typical patient cannot anticipate or prevent being in an automobile accident or developing cancer. Likewise, the doctor cannot determine the type or intensity of diagnosis and treatment until a problem develops, to the extent that he can determine the severity of a problem within a short period of time [7] at all. The uncertainty associated with the nature and extent of potential health problems is thus enormous, and the uncertainty about the cost associated with diagnosis and treatment of such contingent events is equally high. As a result, the patient cannot plan financially for the treatment of his health problems; he may be healthy for the rest of his life and have to spend no money on health

care whatsoever, or he may receive an injury so serious that he could not possibly hope to pay for his treatment with his annual salary. What is the logical market response to this dilemma? Health insurance.

Insurance is a response to uncertainty, and spreads the risk of financial loss occasioned by treatment of disease or injury over both the people who turn out to have little need for health care and those who turn out to have a great need. By paying an insurance premium in a world where the future need for health care is uncertain, a potential patient eliminates the risk of not having the money he needs to pay for diagnosis and treatment, particularly of serious illnesses or injuries, should health care and of particular interest to us, hospital care, be needed. The insurance mechanism is thus an integral part of the market for hospital services.

Moreover, because health insurance is considered a nontaxable fringe benefit to employees, tremendous incentives are created for providing health insurance at the workplace, and many employers provide it. *See, e.g.,* Salkever 2337–8. Health insurance premiums are a cost of doing business for employers. *See, e.g., id.;* Barth 844–5. Thus, employers have an interest in [8] the cost of health care. Some employee groups are even self-insured. *See, e.g.,* Henson 967–69. Moreover, the coverage of health insurance is likely more extensive than it would be if prospective patients had to pay premiums out of taxable income, perhaps evoking more coverage for less financially catastrophic events than otherwise. *See* Salkever 2337–8.

With respect to our analysis, there is one extremely important effect on the hospital services market of third-party payment: The extent to which a patient is insured determines the extent to which he is sensitive to the price of hospital care. If he is fully insured, once he becomes ill his interest lies in receiving the best quality care possible, including the highest quality comforts and surroundings if he is in the hospital, no matter what the costs. Who, then, is concerned about price? We would expect third-party payors and their customers, the world of potential patients and employers who pay insurance premiums, to be interested in minimizing the costs of insurance. Of course, the government and taxpayers, who insure many of the elderly and under-privileged through the Medicare and Medicaid programs, should be interested as well. There is one wrinkle, however. When hospital prices rise, the increased payments made by an insurance company are spread over all its subscribers, both patients and non-patients (*i.e.,* prospective patients); premiums rise less than proportionally to the increase in hospital prices. Thus, not every significant increase in hospital prices will bring a significant market reaction from insurance consumers. However, if insurance premiums

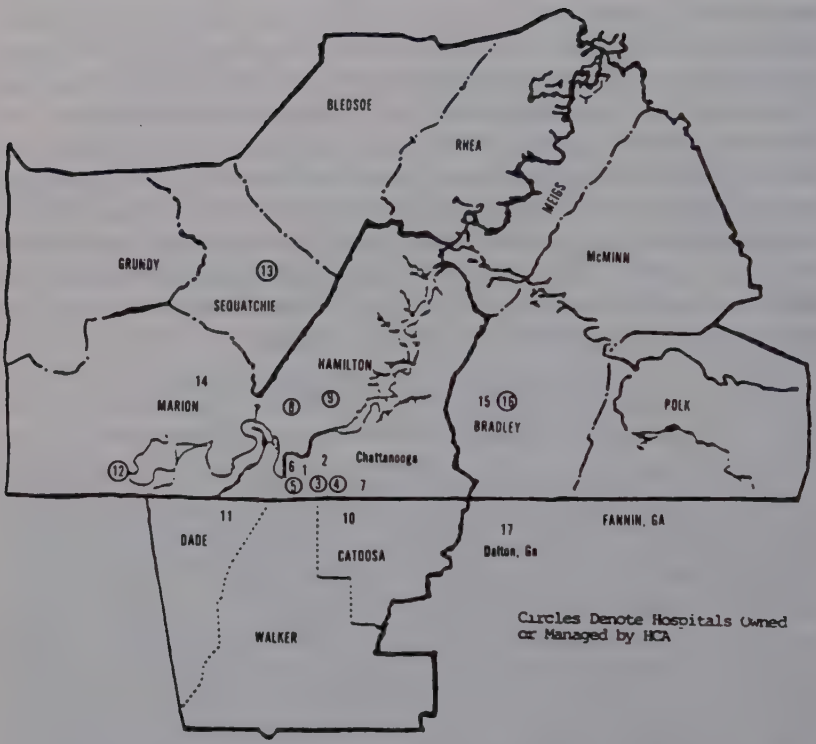
rise sufficiently, [9] even after the cost of health care is spread over so many people, then consumer reaction should reverberate into the health care market. To avoid losing business and to minimize their costs, insurance companies will through the insurance mechanism take whatever actions they can to hold down the prices they pay for hospital and physician care.

We are thus confronted in this case with a very peculiar market indeed. Because of the uncertainty of illness and injury and the grossly imperfect information available to consumers of hospital services, patients generally rely on physicians to determine the nature and extent of the medical care they receive and on third-party payors to provide the financial assurances that such care will be paid for. Any analysis of hospital markets under Section 7 must bear in mind both the role that physicians play on behalf of patients and the role of the insurance market in financing hospital care. With this in mind, we now turn to the merits of the case before us.

II. HOSPITALS IN THE CHATTANOOGA AREA

A. *Hospitals Within the Chattanooga Urban Area*

The city of Chattanooga is situated in Hamilton County in southeast Tennessee on the state boundary with northwest Georgia. I.D.F. 10. Chattanooga is the major city in two federally-designated geographic areas, the Metropolitan Statistical Area ("MSA") and the Georgia-Tennessee Health Service Area ("HSA"). An HSA is an area designated by the Department of [10] Health and Human Services as a region in which state and local health planners are to assess and identify the health needs of the population in the region. I.D.F. 12. An MSA is a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus. I.D.F. 11. The Chattanooga MSA is a six-county area consisting of the Tennessee counties of Hamilton, Marion and Sequatchie and the Georgia counties of Walker, Dade and Catoosa to the south of Chattanooga. *Id.* Marion and Sequatchie counties lie to the west and northwest of Chattanooga, adjacent to Hamilton County; adjacent Tennessee counties to the north and east of Hamilton County are not part of the Chattanooga MSA. [11]



Numbers Show the Locations of the Following Hospitals Within Counties in Tennessee and Georgia:

1. Erlanger Medical Center
2. Memorial Hospital
3. Parkridge Hospital
4. Diagnostic Center Hospital
5. Downtown General Hospital
6. Metropolitan Hospital
7. East Ridge Community Hospital
8. Red Bank Community Hospital
9. North Park Hospital
10. John L. Hutcheson Memorial Tri-County Hospital
11. Wildwood Sanitarium
12. South Pittsburg Municipal Hospital
13. Sequatchie General Hospital
14. Whitwell Hospital
15. Bradley County Memorial Hospital
16. Cleveland Community Hospital
17. Hamilton Medical Center

[12] There are eleven general acute care hospitals in Hamilton County, Tennessee and the Georgia suburbs of Chattanooga—the "Chattanooga urban area." After the acquisitions, HCA owned or managed five of these hospitals. The eleven hospitals include:

1) *Erlanger Medical Center.* Erlanger is located in downtown Chattanooga. It is a non-profit teaching hospital owned and operated by the Chattanooga Hamilton County Hospital Authority, a public agency created by state statute, and is governed by a politically appointed board of trustees. I.D.F. 22. Erlanger is a 780-bed major medical complex which provides a wide range of health care services to the community, and it is the only tertiary care referral center in the HSA. *Id.*[3]

Erlanger is required by law to accept all Hamilton County residents needing hospital care, regardless of their ability to pay, and as a result treats the vast majority of indigent patients in Hamilton County. Approximately 100 beds are used for [13] the treatment of these patients at all times. Lamb 110–11, 115, 134; I.D.F. 23.

2) *Memorial Hospital.* Memorial is located in downtown Chattanooga. It is a non-profit institution which is owned and operated by the Catholic Church. In 1981, Memorial was authorized by the Tennessee Health Facilities Commission to operate 349 general acute care hospital beds. I.D.F. 27. Memorial is a secondary care hospital which also offers some tertiary services, such as open heart surgery. I.D.F. 28.

3) *Parkridge Hospital.* Parkridge is the only hospital HCA owned in Chattanooga before the acquisitions. It is located in downtown Chattanooga. I.D.F. 29. Parkridge is a secondary level hospital with some tertiary capabilities. I.D.F. 30. Parkridge is authorized to operate 296 general acute care hospital beds. *Id.*

4) *Diagnostic Center Hospital.* Diagnostic is an 80-bed facility in downtown Chattanooga which specializes in the diagnosis and treatment of cardiopulmonary disease. I.D.F. 32. HCA now owns this facility, which it purchased from HAI.

5) *Downtown General.* Downtown General is a 65-bed urban general acute care hospital which is located in downtown Chattanooga. I.D.F. 38. It is a non-profit hospital that was managed by HAI before the HCA acquisition, and is currently managed by HCA.

6) *Metropolitan Hospital (formerly Tepper Hospital).* Metropolitan

[3] Hospitals are sometimes classified from most basic to most advanced as "primary," "secondary" or "tertiary." A primary hospital generally provides basic acute care services, such as obstetrics, surgical services, x-ray, clinical laboratory and blood services, a minimal level emergency room, pharmacy and anesthesia services, and minimal intensive care capabilities. Secondary care generally includes the primary services listed above along with more specialized capabilities such as EEG equipment, diagnostic and therapeutic equipment for cancer patients and 24-hour physician coverage. A tertiary level hospital generally has the same facilities as hospitals on the other two levels, but also has specialized services such as open heart surgery capabilities, cardiovascular diagnostic lab, CAT scanner, burn-care unit, and oncology services. I.D. at 10 n. 3. A referral hospital is one that because of the level of sophistication of its services is able to attract patients from smaller facilities having more limited services and capabilities. *Id.*

is a 64-bed proprietary hospital owned and operated by American Healthcorp, Inc., which purchased the facility in [14] 1982, subsequent to the HCA acquisitions. I.D.F. 39. The hospital's primary focus is on pediatrics, but it has recently expanded into other services. *Id.*

7) *East Ridge Community Hospital.* East Ridge is located in the community of East Ridge, approximately six miles east of downtown Chattanooga. I.D.F. 31. It is a general acute care hospital authorized to operate 128 beds, and has an active obstetrical practice in which it provides secondary level care. East Ridge is owned and operated by Humana, Inc., a large, for-profit hospital chain. *Id.*

8) *Red Bank Community Hospital.* Red Bank is a 57-bed general acute care hospital located in the Red Bank community north of Chattanooga. I.D.F. 34. Red Bank is a non-profit hospital owned by the Health and Educational Facilities Board of the City of Red Bank and is leased to the Red Bank Hospital Association. *Id.* HAI managed the facility prior to the acquisition, and HCA managed the facility for several months after the acquisition.

9) *North Park Hospital (formerly Medical Park Hospital).* Medical Park was in 1981 an 83-bed facility in downtown Chattanooga owned by HCC before its acquisition by HCA. I.D.F. 35. The hospital was relocated to the suburban north Chattanooga community of Hixson and opened as HCA-owned North Park Hospital in 1982. I.D.F. 36. North Park offers primary and limited secondary level services. It has the latest technology available for the medical and surgical specialties and services generally offered in suburban hospitals. I.D.F. 37. [15]

10) *John L. Hutcheson Memorial Tri-County Hospital.* Tri-County is located in the Ft. Oglethorpe community in the Georgia suburbs just across the state line from Chattanooga. I.D.F. 41. Tri-County is a public hospital owned by the Hospital Authority of Walker, Dade and Catoosa Counties in Georgia. *Id.* Tri-County provides primary and secondary services comparable to those of Parkridge Hospital. I.D.F. 42. In 1981, Tri-County was authorized by the State of Georgia to operate 237 general acute care hospital beds. It provides care for indigents and Medicaid recipients in northwest Georgia. *Id.*

11) *Wildwood Sanitarium & Hospital.* Wildwood is a 39-bed facility located in Dade County, Georgia, approximately 10 minutes from Chattanooga. I.D.F. 43. It is owned by the Seventh Day Adventist Church and provides non-traditional services such as alcohol, diet, and non-smoking programs. It also provides some general acute care services. *Id.*

B. *Hospitals Within a 45-minute Driving Radius of Chattanooga*

The closest population centers to Chattanooga are: Dalton, Georgia, which lies approximately 40 minutes southeast of downtown Chattanooga on Interstate 75 (I.D.F. 14); Cleveland, situated in Bradley County, Tennessee, approximately 40 minutes northeast of downtown Chattanooga on Interstate 24 (I.D.F. 15); South Pittsburg, located in Marion County, Tennessee, approximately 40 minutes west of downtown Chattanooga across the Tennessee River (I.D.F. 16); Dunlap, located in Sequatchie County, Tennessee, approximately 45 minutes northwest of downtown [**16**] Chattanooga (I.D.F. 17); and Whitwell, in Marion County, Tennessee, approximately 40 minutes northwest of downtown Chattanooga. I.D.F. 18.

At least one general acute care hospital is located in or near each of these communities. Hospitals within 45 minutes driving time of Chattanooga, numbered as shown on the map above, include:

12) *South Pittsburg Municipal Hospital.* South Pittsburg is a city-owned facility in South Pittsburg, Tennessee, which was approved for use of 107 beds in 1981. I.D.F. 44. It is comparable to the smaller Chattanooga hospitals in terms of quality and range of services. *Id.* South Pittsburg was managed by HAI before the acquisition and is now managed by HCA pursuant to a long-term contract. *Id.* The hospital is approximately 42 minutes from downtown Chattanooga by car. I.D.F. 45.

13) *Sequatchie General Hospital.* Sequatchie General is a small, primary care facility located in Dunlap, Tennessee. I.D.F. 46. In 1981 it was approved to operate 49 beds. RX 1093. Sequatchie was acquired by HCA from HAI in the 1981 acquisition. In December, 1982, HCA sold the hospital to Republic Health Corporation as part of a larger transaction in which it obtained stock ownership in Republic. I.D.F. 47.

14) *Whitwell Community Hospital.* Whitwell is a 25-bed facility located in Whitwell, Tennessee. I.D.F. 48. It is an old, lower quality facility with a small medical staff. *Id.* However, it was purchased by Rural Hospital Associates, Inc. in 1982, and a new 40-bed facility is currently being built. I.D.F. [**17**] 49. Whitwell is approximately 40 minutes away from downtown Chattanooga by car. I.D.F. 50.

15) *Bradley County Memorial Hospital.* Bradley Memorial is a 251-bed city-owned hospital located in Cleveland, Tennessee. I.D.F. 55. It is a full-service community hospital that provides primary and secondary care and some intensive care services. It offers a range and quality of services comparable to many of the hospitals in Chattanooga. *Id.*

16) *Cleveland Community Hospital.* Cleveland Community is a 100-

bed full-service hospital owned by HCA and located in Cleveland, Tennessee. I.D.F. 52. The hospital is approximately 41 minutes from downtown Chattanooga. *Id.*

17) *Hamilton Medical Center.* Hamilton is a publicly-owned facility located in Dalton, Georgia. It is a 297-bed facility approximately 40 minutes from downtown Chattanooga on Interstate 75. RX 1030(3); RX 1093. Hamilton is a modern medical center providing secondary care comparable to that available from Tri-County Hospital and to a lesser extent Memorial and Parkridge. Lamb 152; *see* Petruzzi 757; Furrey 1605.

III. THE PRODUCT MARKET

An acquisition violates Section 7 of the Clayton Act "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18 (1982). Accordingly, we now turn to the definition of the relevant "line [18] of commerce" or "product market" in which to measure the likely competitive effects of these acquisitions. In measuring likely competitive effects, we seek to define a product or group of products sufficiently distinct that buyers could not defeat an attempted exercise of market power on the part of sellers of those products by shifting purchases to still different products. Sellers might exercise market power by raising prices, limiting output or lowering quality. *See Grand Union Co.*, 102 F.T.C. 812, 1040 (1983).

Complaint Counsel argued below that the product market[4] was properly defined as the provision of acute inpatient hospital services and emergency hospital services provided to the critically ill.[5] This definition would exclude non-hospital providers of outpatient services, *e.g.*, free standing emergency centers, as well as non-hospital providers of inpatient services, *e.g.*, nursing homes, from the product market. It would also exclude the outpatient business of hospitals, except for that provided to the critically ill in the emergency room. The rationale for excluding outpatient care is that inpatient [19] services are the reason for being of acute care hospitals; inpatient services are needed by and consumed by patients in combination and therefore can be offered only by acute care hospitals. Inpatients in almost all cases will purchase a range of services and not just one test or procedure; they will typically consume a "cluster" of services in-

[4] Since hospitals in the main offer services, the relevant line of commerce in this case could be deemed the "service market." However we will adhere to the term of art "product market" throughout this discussion.

[5] More precisely, Complaint Counsel's expert witness, Dr. David S. Salkever, professor of health economics at Johns Hopkins University, testified that the market should be defined as "the provision of acute inpatient hospital services and the provision of hospital services to critically ill emergency patients, typically who I suspect would be admitted as inpatients if indeed they survived at the critical episode." Salkever 2280.

volving 24-hour nursing, the services of specialized laboratory and X-ray equipment, the services of equipment needed to monitor vital functions or intervene in crises, and so forth. An acutely ill patient must be in a setting in which all of these various services can be provided together. Salkever 2282–83. According to this reasoning, outpatient services are not an integral part of this "cluster of services" offered by acute care hospitals, and therefore must be excluded.

Respondent, on the other hand, urged that the market be defined to include outpatient care as well as inpatient care. Respondent's expert witness, Dr. Jeffrey E. Harris, testified that outpatient care is growing rapidly for hospitals, as well as for free-standing facilities such as emergency care and one-day surgery centers, which compete with hospitals for outpatients. Harris 3943–44. Moreover, because of substantial changes in medical technology, there are a growing number of procedures that can be provided on an outpatient basis that previously could have been done on only an inpatient basis. Harris 3944.

Judge Parker agreed that the market should include outpatient services provided by hospitals but excluded outpatient services provided by non-hospital providers, holding that only [20] hospitals can provide the "unique combination" of services which the acute care patient needs. I.D.F. 134. He defined the relevant product market to be the cluster of services offered by acute care hospitals, including outpatient as well as inpatient care, "since acute care hospitals compete with each other in offering both kinds of care and since . . . acute care outpatient facilities feed patients to the inpatient facilities." *Id.*

Neither HCA nor Complaint Counsel appeal Judge Parker's product market definition. *See* Commission Rule of Practice 3.52(b). Accordingly, for purposes of this proceeding only we accept Judge Parker's finding on this issue.[6]

However, we do note that Judge Parker's definition does not necessarily provide a very happy medium between the two competing positions; the evidence in this case tended to show *both* that free-standing outpatient facilities compete with hospitals for many outpatients and that hospitals offer and inpatients consume a cluster of services that bears little relation to outpatient care. *See, e.g.,* Coddington 463–69; Harris 3943–45; Parkhurst 1396; Kennedy 1760–63; Salkever 2279–87. If so, it may be that defining the cluster of hospital inpatient services as a separate [21] market better reflects competitive reality

[6] In this case, the product market issue would unlikely be outcome-determinative. First, even if the outpatient services of non-hospital providers were included in the market, HCA concedes that their inclusion would not greatly affect hospital market shares. *See* RAB at 16; I.D.F. 135. Thus, it seems safe to conclude that adding such services to the relevant product market would add little to the analysis in this case. Second, both measures of inpatient market power and measures that include hospital outpatient services provide the same basis for liability in this case. *See* discussion *infra* section V.C. Thus, excluding outpatient care from the market would add little to the analysis.

in this case. In *American Medical International, Inc.*, No. 9158, slip op. at 21 (July 2, 1984) ("*AMI*") [104 F.T.C. 1], we defined the relevant product market as the "cluster of general acute care hospital services" to the exclusion of outpatient substitutes for individual services that comprise the cluster, since the "benefit that accrues to patient and physician" is derived from the complementarity of those services. It may well be that in this case the proper product market excludes *all* outpatient care; perhaps outpatient care should be a separate relevant market or markets. In any case, it is clear from the evidence that the core and vast majority of an acute care hospital's business is acute inpatient care. *See, e.g.*, Salkever 2286–87. Certainly, it is clear that anticompetitive behavior by hospital firms could significantly lessen competition for hospital inpatients that could not be defeated by competition from non-hospital outpatient providers. Our analysis will hence proceed with primary reference to the cluster of services provided to inpatients.

IV. THE GEOGRAPHIC MARKET

We now turn our attention to the relevant geographic market or "section of the country" in which competition could be substantially lessened by these acquisitions. *See AMI*, slip. op. at 21–22. Because we are concerned only with an area in which competition could be harmed, the relevant geographic market must be broad enough that buyers would be unable to switch to [22] alternative sellers in sufficient numbers to defeat an exercise of market power by firms in the area. Again, sellers may exercise market power by raising prices, reducing output or reducing quality. *See Grand Union Co.*, 102 F.T.C. 812, 1040, 1047 (1983). If an exercise of market power could be defeated by the entry of products produced in another area, both areas should be considered part of the same geographic market for Section 7 purposes, since competition could not be harmed in the smaller area. That is, the geographic market should determine not only the firms that constrain competitors' actions by currently selling to the same customers, but also those that would be a constraint because of their ability to sell to those customers should price or quality in the area change. *See AMI*, slip. op. at 22.

Looking at a "static" snapshot of a market is thus insufficient in itself, since that picture might not reflect a likelihood of future anticompetitive market behavior suspect under Section 7. Rather, evidence of current market behavior must be viewed in a "dynamic" framework that considers the possible competitive responses of firms outside the current market area to anticompetitive behavior of firms within. Of course, a static picture of the market is a logical starting point for a dynamic analysis. First, only when current market struc-

ture is apparent can the potential for competition from other areas in the event of an exercise of market power in the current market be assessed. Second, the type of evidence utilized in a dynamic analysis may often be the same evidence [23] used in a static analysis. For example, evidence of shipment patterns (or of concern to us here, "patient flow" patterns) may reveal not only the firms that currently sell substantial amounts to customers in an area but also those that could substantially increase shipments to the area in response to anticompetitive behavior of firms within the area. In any case, the evidence must be looked at in the dynamic light of potential harm to competition.

HCA would have us adopt Hamilton County, Tennessee, together with Walker, Dade and Catoosa counties in Georgia, the "Chattanooga urban area," as the relevant geographic market. HCA predicates its conclusion largely on an analysis of evidence concerning physician admitting patterns.

Dr. Harris, HCA's expert, testified that the relevant geographic market is determined to a great extent by physician admitting practice, because physician preference, rather than patient choice, decides what hospitals will be utilized. He contended that "for the great majority of people we're talking about in a health care market like Chattanooga, you pick your doctor and then your doctor is the one who's going to decide where you're admitted." Harris 3965. HCA introduced a study that lists, for each hospital in the Chattanooga area, the physicians by specialty who admitted to the hospital, and the number of inpatient days for which each physician was responsible in all of the hospitals in the area. RX 1081; Harris 3961. With few exceptions, every physician who admitted to Chattanooga urban area hospitals admitted exclusively to other hospitals in the [24] Chattanooga urban area. Harris 3961–62; I.D.F. 148, 150–57. Conversely, physicians admitting and treating patients at hospitals outside the Chattanooga urban area rarely admitted and treated patients at hospitals in the Chattanooga urban area. Harris 3963–64; I.D.F. 150, 158–62.

Indeed, testimony made clear that physicians play a primary role in determining where their patients are admitted. *E.g.*, Lamb 366–67; Coddington 488; Kantanie 1147; Parkhurst 1378–80. Moreover, Chattanooga physicians try to limit their practices to a local area because of the time and inconvenience involved in traveling between hospitals. Coddington 499; Furrey 1550; Kennedy 1755; *see AMI,* slip. op. at 24. The few Chattanooga physicians who do have consulting or courtesy privileges at hospitals outside the Chattanooga urban area do not actively practice at the outlying hospitals. RX 1114; I.D.F. 149; *see* CX 892.

Additionally, the weight of the evidence concerning patient origin suggests that patients admitted to Chattanooga urban area hospitals who live outside of the Chattanooga urban area are, with few exceptions, in need of specialized care and treatment unavailable in their own communities. Lamb 148; Dunlap 3344; Harris 3968; I.D.F. 163, 165–67, 169; *see AMI,* slip. op. at 24. Hospitals in outlying communities do not always provide quite the same product that the urban area hospitals provide such patients, and therefore patient inflows are not necessarily indicative of the willingness of patients to leave their home areas for services that are available in those areas. In fact, most admissions to urban area hospitals from outlying counties appear [25] to be through physician referrals. Dunlap 3344; I.D.F. 166–7, 169. Judge Parker agreed with HCA that the Chattanooga urban area is the relevant geographic market in this case.[7] [26]

On appeal, Complaint Counsel agree that the Chattanooga urban area is an appropriate geographic area in which to assess the competitive effects of these acquisitions. However, they claim that a much more appropriate geographic market is the federally designated Metropolitan Statistical Area that includes Chattanooga. In effect, Complaint Counsel would have us add the Tennessee counties of Marion and Sequatchie to the market proffered by HCA and adopted by Judge Parker. By adding this area, three additional hospitals—South Pittsburg Municipal Hospital, Sequatchie General Hospital, and Whitwell

[7] Judge Parker also found that the Chattanooga urban area was the smallest geographic area at issue to satisfy the "Elzinga-Hogarty test" ("E-H test") as applied to patient flow data. This geographic market test, named for the economists who developed it, measures the amount of commerce that leaves the market in question and the amount that enters that same area. *See* Elzinga and Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits,* 18 Antitrust Bull. 45 (1973); Elzinga and Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal,* 23 Antitrust Bull. 1 (1978).

More technically, the E-H test is based on LIFO ("little in from outside") and LOFI ("little out from inside") statistics. A LIFO statistic as applied to hospital geographic markets signifies the percentage of hospital patients from a particular area who remain in the area for hospital services rather than use hospitals outside the area. When the great majority of patients residing in a specified geographic area use hospitals within that area, then only a small proportion of hospital services are "imported" to local residents from hospitals without the area (even though "importation" of services from outside hospitals would actually require local residents to drive to those outside hospitals). A LOFI statistic as applied to patient flow data signifies the percentage of patients of an area's hospitals who reside in the area rather than outside the area. If very few patients of the hospitals in question are residents of other areas, the amount of commerce "exported" is very low (though "exports" of local hospital services would require outside residents to drive into the local area).

Evidence that few patients leave an area [LIFO] and few patients enter an area to obtain hospital services [LOFI], strongly supports the conclusion that the area constitutes a relevant geographic market, according to the analysis. *See* Salkever 2295–6, 2299–2305, 2504–06; I.D.F. 141. If LOFI and LIFO percentages are low, then the area in question is obviously too small and must be expanded to include other hospitals to which patients can and do turn. *See id.* Judge Parker found that utilizing the Chattanooga urban area increases the LOFI value by 10 percentage points over the Hamilton County area, whereas the Chattanooga MSA and other broader potential markets increase the LOFI value only marginally over the Chattanooga urban area, "suggesting that one need not seek beyond the confines of Dr. Harris' market to find the relevant geographic market." I.D.F. 187; *see* RX 1087. Presumably, the smallest area to satisfy the E-H test is appropriate since areas larger than that do not necessarily reflect the ability of hospitals in any sub-area to exercise market power. For example, the United States would likely satisfy the Elzinga-Hogarty test in this case, but it is obvious that a national market would be absurd; doctors would not refer patients to California for general acute care if anticompetitive behavior occurred in Chattanooga. *See* Salkever 2505. Conversely, significant market power could not be exercised in an area too small to satisfy the E-H test, since the current significant influx of patients into the area could obviously cease and the current significant outflux could increase. *See* Salkever 2518–19.

Community Hospital—would be included in the relevant market. Both South Pittsburg and Sequatchie were acquired by HCA from HAI, and Complaint Counsel seek divestiture by HCA of its long-term lease arrangement with South Pittsburg.[8]

The Chattanooga MSA is the better geographic market, Complaint Counsel argue, because it takes into account not only current competitive conditions but also likely dynamic responses [27] to market changes by potential competitors. The analysis offered by HCA and adopted by Judge Parker is purely static, they argue. Complaint Counsel contend that the hospitals in Marion and Sequatchie counties could react to the exercise of market power by hospitals in the Chattanooga urban area by drawing away patients should prices rise or quality drop. They assert that the evidence relied upon by HCA and by Judge Parker does not "take into account changes that could occur as a result of the exercise of market power by firms in the area, and it was therefore an error for the judge not to find as a market an area that does take such changes into account." CAB at 22–23.

One must wonder, however, why only hospitals in the two MSA counties to the west and northwest of Chattanooga would deter an exercise of market power by Chattanooga firms when there are high quality hospitals of equal distance to the northeast and southeast of the city. Bradley County Memorial Hospital and Cleveland Community Hospital in Cleveland, Tennessee, as well as Hamilton Medical Center in Dalton, Georgia, are no further from Chattanooga than South Pittsburg, Sequatchie or Whitwell hospitals. *See supra* section II.B. and map. Moreover, Bradley, Cleveland and Hamilton have some 648 beds between them while the three outlying MSA hospitals house merely 181 beds. Complaint Counsel would essentially have us expand the market from the Chattanooga urban area by drawing a half-circle around Chattanooga, ignoring the potential competitive pressures of the three hospitals to the northeast and southeast of the city. [28]

Complaint Counsel nevertheless contend that the MSA is an "integrated area" within which patients have the ability to choose between hospitals. They make several arguments in support of this contention. First, because an MSA reflects general trade and commuting patterns, the potential competition among hospitals located in the Chattonooga MSA for MSA residents can be inferred. Second, Complaint Counsel point to federal government use of MSA's to distinguish between urban and rural areas, a distinction which is one factor in determining reimbursement levels under the new Medicare prospective payment system. They claim that "MSA's have been determined by the federal government, as a purchaser of health care services, to

[8] HCA no longer owns Sequatchie. *See supra* section II.B.

define reasonable boundaries for pricing of hospital services." CAB at 24. Moreover, the full implementation of the Medicare prospective payment system will allegedly stimulate "further integration" of MSAs into distinct hospital markets because hospitals outside an MSA will be disadvantaged in their capacity to compete with nearby MSA hospitals; the smaller "rural" reimbursement rate they receive will leave them less able to expend funds on quality competition and service improvements. At the same time, at least with respect to the substantial number of patients enrolled in the Medicare program, the MSA will become to an even greater extent an area within which pricing patterns will be linked and price movements will be similar, according to Complaint Counsel. CAB at 25. [29]

We reject Complaint Counsel's analysis. Although their criticism of HCA's argument as a purely static analysis is valid, their own "dynamic" analyis is flawed. Although some of the market forces that are reflected in designation of an MSA may be relevant to the determination of the relevant geographic market in a Section 7 case, *see Grand Union Co.*, 102 F.T.C. 812, 1049 (1983), any inferences to be drawn from federal designation of an MSA in this case are insufficient to establish the Chattanooga MSA as the relevant geographic market.

Complaint Counsel's argument does not convince us that the hospitals to the northeast and southeast of Chattanooga would be less able to exert a restraining influence on urban area hospitals than the hospitals to the west of the city. First, we can find no reason why Chattanooga urban area doctors would be more willing to obtain admitting privileges at outlying MSA hospitals than at the more modern and better-equipped Bradley or Hamilton hospitals. Nor do we find any reason why it would be more difficult for Chattanooga doctors to obtain admitting privileges at the hospitals to the east of the city. Likewise, to the extent that patients influence where they are admitted, we find no explanation for why they would prefer the smaller, more rural hospitals to the west of Chattanooga. The considerations that go into designating an MSA, and the ways in which the federal government puts such designations into use, do not answer these crucial questions. The fact is that use of the Chattanooga MSA as the relevant geographic market would exclude a large number of hospital beds that are equally as accessible to [30] physicians and patients as the beds it would include. Certainly, the greater number of beds to the northeast and southeast would provide a *greater* constraint on the exercise of market power in the Chattanooga urban area, if at all. We therefore find Complaint Counsel's argument to be economically artificial.[9]

[9] Patient inflow into the Chattanooga urban area from outlying MSA counties cannot save Complaint Counsel's proposed market. First, as discussed above, the weight of the evidence suggests that the great part of patient flow

(footnote cont'd)

We do not here contend that the proper market in this case includes all hospitals within a 45-minute radius of downtown Chattanooga; indeed, that question is not before us. Rather, we conclude that if the market were to be larger than the Chattanooga urban area, under a dynamic analysis it would have to include all equally likely sources of potential competition.

Additionally, we note the weakness of the evidence Complaint Counsel does offer in view of the presence of the hospitals to the east of Chattanooga. Geopolitical designations such as "MSA" may reflect a host of considerations that do not concern the issue of competition between hospitals. Certainly, the Chattanooga MSA was not designated in a manner that would explain why hospitals to the east of Chattanooga are less likely to deter [31] an exercise of market power in Chattanooga than are MSA hospitals of equal accessibility to the west of Chattanooga. Nor do we find any evidence that MSA designations were ever intended to reflect an economic market for purposes of Section 7. We do not here conclude that an MSA will never accurately reflect the relevant geographic market in a hospital merger case. But where, as here, the MSA designation excludes important sources of potential competition, it must be rejected. Likewise, the argument respecting the new Medicare reimbursement system, though intriguing, is weak. Complaint Counsel ask us to rely upon pure speculation as to the effect of the new Medicare prospective payment system on competition between hospitals within an MSA and hospitals without for Medicare or other patients. This we decline to do. We find no basis in the record for concluding that the new Medicare payment system somehow will create a separate geographic market for section 7 purposes.

Since Complaint Counsel concede that the Chattanooga urban area is an appropriate market within which to assess the competitive effects of these acquisitions, we conclude that the Chattanooga urban area is the relevant "section of the country" for purposes of this case. However, we note that Complaint Counsel's criticism of the evidence offered by HCA is a valid one; HCA offered a static picture of the market without offering evidence or argument considering the likelihood or unlikelihood that physicians and their patients in Chattanooga would travel to outlying hospitals in the event of an exercise of market power by Chattanooga urban area hospitals. [32]

A proper dynamic analysis might have considered some of the evi-

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into Chattanooga hospitals from outlying areas is for specialized treatment not available in outlying hospitals. Thus, such inflow does not reflect well the ability of outlying hospitals to compete away those patients should Chattanooga hospitals behave anticompetitively. Second, the evidence shows in any case substantial inflow from Bradley County which lies to the east of Chattanooga. *See* Salkever 2301–02. Indeed, Complaint Counsel's own expert, Dr. Salkever, rejected the Chattanooga MSA as the relevant geographic market in this case partly on that basis. *Id.* The Chattanooga MSA thus cannot be distinguished on the basis of inflow data.

dence in this case as follows: "The closest hospitals to the Chattanooga urban area are about 45 minutes driving time away. *See supra* section II.B. Chattanooga doctors try as much as possible to avoid travel, because it is time consuming and inconvenient. *See supra* this section. It is unlikely that doctors would be willing to make rounds that far away from home on a daily basis in response to a small but significant reduction in the quality of hospital services in Chattanooga. They therefore would be very unlikely to admit patients to outlying hospitals. It is also unlikely that patients themselves would seek hospitalization that far away from home even if they recognized a small but significant change in the quality or price of services in Chattanooga. The evidence suggests that family and friends do not like to commute far to visit patients. *See, e.g.,* Parkhurst 1393. Proximity to family and friends is therefore very important to the hospital inpatient. Thus it is highly unlikely that many patients and their employers would agree to insurance coverage that required extensive travel for health care, even if insurance carriers had to increase premiums because of a small but significant exercise of market power by Chattanooga hospitals."

It is clear that the analysis offered by HCA and adopted by Judge Parker is incomplete. A review of patient flow data, physician admitting patterns, and other facts integral to a static analysis may all be important to a proper dynamic analysis, since a picture of current competition must be drawn [33] before competitive responses to changes in that competitive pattern can properly be considered. But without looking at those facts in a framework considering potential competitive responses to the current market picture, a relevant geographic area in which competition may be substantially harmed will be extremely difficult to define. In any event, the Chattanooga urban area is the area within which we will assess the competitive effects of these acquisitions.

V. THE EFFECT ON COMPETITON

A. *The Effect of HCA-Managed Hospitals*

One of the major dimensions of HCA's purchase of HAI was the acquisition of some 75 to 80 hospital management contracts. Main 3756, 3773 (President of HCA Management Company) ("It was our opinion that the total price we were paying to INA to acquire the assets of Hospital Affiliates from them included a certain amount of money designated as the value of the management contracts and the future revenues to be derived from them that HAI had at that time. . ."). Two of these were management contracts HAI had with two

hospitals in the Chattanooga urban area—Downtown General Hospital and Red Bank Community Hospital. The terms of both management contracts were four years. CX 185I; CX 189G. The question arises as to what degree HCA's assumption of management of these two hospitals enhances its market position, and how best to characterize HCA's management role in assessing the likely effect on competition of these acquisitions.[10] [34] HCA argues, and Judge Parker agreed, that Downtown General [35] and Red Bank hospitals should be treated an entities completely separate from HCA, incapable of being significantly influenced by HCA in its role as administrator. Complaint Counsel argue that treating hospitals that HCA manages as entities completely independent of HCA is contrary to the facts in this case and to common sense. They would have us include the market shares of HCA-managed hospitals within the HCA's market share or at the very least consider HCA management as a significant factor

[10] HCA's management relationship with Red Bank was terminated by agreement in July 1982, almost one year after HCA purchased the management contract from HAI and prior to the contract's expiration date. *See* CX 27M; CX 87; CX 185A, I. We are thus faced with the difficult question of whether HCA's voluntary post-acquisition termination of the management agreement (*see* CX 87) should be considered in assessing the likely competitive effects of these acquisitions. In *AMI*, we examined the controlling case law and determined that consideration of post-acquisition evidence is appropriate when such evidence is relevant to the effects of a merger and is beyond the control of the merging firms. *AMI*, slip. op. at 38–44; *see United States v. General Dynamics Corp.*, 415 U.S. 486, 504–06 (1974); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 576 (1967); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States v. Continental Can Co.*, 378 U.S. 441, 463 (1964).

The genesis of the termination was a dispute between the Red Bank hospital board and HCA. The Red Bank board requested termination of the management contract because board members believed that HCA could not properly manage Red Bank while at the same time owning neighboring North Park Hospital; the new North Park, which HCA acquired from HCC while it was still "Medical Park" in downtown Chattanooga, was expected to be Red Bank's prime competitor in its new location. *See, e.g.*, Stulce 1198–99; Pust 3661; CX 27M; I.D.F. 213. Nevertheless, HCA voluntarily relinquished its rights under the management contract when it could have asserted those rights. Indeed, HCA initially opposed the termination and did not agree to the termination until March, 1982, after HCA was apprised in December, 1981, (*see* RAnB at 14) that FTC staff was continuing its investigation of these acquisitions. Stulce 1204; XC 87; Pust 3634; I.D.F. 213; *see* Pust 3661–63; CX 214B; RX 954. Termination occurred in July, 1982 shortly before the complaint in this suit issued.

HCA rarely agrees to early termination of a management contract. Main 3757–59. In fact, HCA sued several hospitals that had management contracts with HAI and attempted to sever their relationship with HCA after HCA purchased those contracts. Main 3757–58; *see* CXs 216–219. HCA obviously had a good measure of control over the future of its relationship with Red Bank; certainly, the Red Bank termination was not a matter completely beyond HCA's influence. *See AMI*, slip. op. at 38–44.

Thus, no matter what the nature of the dispute between HCA and Red Bank, we will not consider a voluntary termination of that relationship in assessing the likely competitive effects of these acquisitions. Otherwise, an acquiring firm could make anticompetitive acquisitions and then, when confronted with liability, dispose of assets in a manner that best retains its market position while reducing statistical measures of concentration to more favorable levels. *See Dean Foods Co.*, 70 F.T.C. 1146, 1269 (1966) ("We do not believe that post-acquisition market shares can be adjusted for actions which the acquiring company itself undertook. To allow such self-serving adjustments to affect the legality of a merger would be to invite companies to merge and then to exercise the resultant power to restructure the market according to their whims and desires provided some optimum market share was reached or other favorable restructuring achieved which might by itself be regarded as inoffensive to the competitive dynamics of the market if it had been achieved as a result of unmanipulated market forces"); *American General Insurance Co.*, 97 F.T.C. 339, 340–41 (1981).

We do not believe that respondents should be encouraged to make illegal acquisitions and then cure them with self-appointed remedies. Rather, we think it is up to the Commission and courts to determine the proper restoration of pre-acquisition levels of competitiveness once an illegal acquisition is made. Since the original management contract with Red Bank could have been in effect at the close of evidence in this case had HCA successfully opposed the termination, we will treat the Red Bank contract no differently from that HCA retained with Downtown General for purposes of liability. *See* CX 185. In any case, the exclusion of Red Bank from HCA's market share would not affect the outcome in this case. *See infra* n. 18.

increasing the likelihood of anticompetitive behavior in this market. [36]

We conclude that treating the two managed hospitals as entities completely independent of HCA is contrary to the overwhelming weight of the evidence in this case. As manager, HCA controls the competitive variables needed for successful coordination with the activities of HCA-owned hospitals in Chattanooga. Moreover, as manager it knows the competitive posture of managed hospitals so well that the likelihood of any anticompetitive behavior HCA wished to engage in is greatly increased.

We note first the role of market shares in assessing the likelihood of anticompetitive effects under Section 7. Market share figures are merely a convenient way to depict the structure of a market; they are all artificial to the extent that they deviate from an accurate representation of the market power of firms they are assigned to. *See Echlin Manufacturing Co.*, No. 9157, slip. op. at 8–9 (June 28, 1985) [105 F.T.C. 410]; *Grand Union Co.*, 102 F.T.C. 812, 1038–41 (1983). Including the market share assigned to a managed hospital within the market share of its manager is artificial only to the extent that it is not an accurate representation of the manager's market position. We hold that including the market shares of Downtown and Red Bank within HCA's share presents a much more accurate picture of HCA's market power than does ignoring HCA's management position or considering its relevance in some other manner.

Both the chief executive officer (the hospital administrator) and the chief financial officer (the controller) are provided by HCA to Downtown General and Red Bank. CX 185G; [37] CX 189E; Chambliss 1434. Although the boards of the managed hospitals retain ultimate policymaking authority, the management contracts provide that HCA as manager is responsible for the day-to-day operation of the facilities, and is charged with making recommendations to the boards regarding virtually all aspects of the institutional operation. CX 185; CX 189; *see* Main 3746, 3749–50. This responsibility includes preparing the budget and proposed hospital rates for the boards. CX 185D-E; CX 189C-D; Chambliss 1436–37; Stulce 1190–91. Thus, HCA is intimately involved in the rate setting process. HCA is also responsible for other important aspects of the way its managed hospitals compete, including the quality control of the hospitals, hiring and discharging personnel, advising the hospital boards concerning charges and services offered by the hospitals, and compliance with government regulations. CX 185; CX 189; *see* Chambliss 1437.

Indeed, the very reason that a management firm is hired, as reflected in the management contracts, is to direct the competitive operations of the managed hospital. The evidence shows clearly that

management recommendations, including proposed rate increases, are almost invariably followed by the boards of directors of Downtown General and Red Bank. Chambliss 1435–40; Stulce 1191–92; Smith 1954; Kantanie 1057, 1059, 1080; *see generally* CX 310; CX 311; CX 390; CX 391; CXs 428–80. Long-time board members of both hospitals acknowledge that they and their colleagues do not have the expertise necessary to administer hospitals, and for that reason rely heavily on management. [38] Stulce 1178, 1190; Chambliss 1425, 1432, 1435; *see also* CX 185A.

Thus, the question is not whether HCA "dominates" the boards of the respective institutions, but whether the management arrangements enhance the ability to coordinate behavior between HCA-owned and managed hospitals so that any collusion in the market in which HCA desired to participate is more likely. We think it clear that the management relationships greatly enhance HCA's ability to coordinate behavior, since HCA personnel run the hospitals' competitive mechanisms and the hospital boards have hired managers for the very reason that the boards have neither the time nor the expertise to manage the variables of hospital competition themselves.

We can see no reason why HCA recommendations to the Downtown General and Red Bank boards to raise prices a certain amount or cut back on the employment of certain personnel, for example, would be either detected or discouraged by board members given their substantial reliance on HCA. Nor can we see why coordination with owned hospitals would be difficult for HCA to establish in view of its influence over competitive variables, access to information, and substantial control of the flow of information to the boards. Indeed, the evidence in this case indicates more than a symbiotic relationship between the two types of HCA hospitals. HCA's sister relationship program for coordination between HCA hospitals in the same local area includes both owned and managed hospitals. CX 206C-D; CX 214A; Pust 3664; Bennett 3724–25. In Chattanooga, HCA held meetings for both owned and managed hospital administrators "to initiate [39] them into the HCA philosophy." Pust 3649–50; *see also* CX 400A. Moreover, though the evidence is not clear on the specifics involved, it is clear that HCA was in the preliminary stages of an area-wide plan to coordinate the activities of its Chattanooga hospitals—both owned and managed— but abandoned the plan when this litigation began. CX 625; Colton 3796–97; Stern 602–03, 611–12.

In the case of Downtown General, HCA owns assets important to the continuing existence of the institution. HCA owns not only the land on which the hospital is located, but also the physician office building situated adjacent to the facility. Chambliss 1419, 1463–64; Bennett 3699–701. Physicians with offices in the adjacent building

account for approximately 95% of the hospital's admissions. CX 334J. Moreover, the hospital board acknowledges that the hospital would not survive without the medical officer building. Chambliss 1423–24. Interestingly, Judge Parker recognized that hospital control over adjacent office buildings is important to attract admitting physicians when he ordered that HCA divest such buildings in connection with the ordered divestiture of its hospitals. I.D. at 91. As long as HCA has the power to control the medical office building or divert its use, it appears unlikely that the Downtown General board will disrupt the current management relationship under any circumstances.[11] [40]

Certainly, since HCA has access to all competitively important data, even if it had no input into deciding the competitive strategy of a managed hospital, it could use information about the hospital in connection with planning the competitive strategy of its neighboring owned hospitals. Having access to essentially all information about the managed hospital's ability to compete or to react to market forces or to collusive conduct by other firms, HCA is in a much better position to confidently make competitive or anticompetitive moves itself; such information would allow HCA and other conspirators to better assess the likelihood of successful collusive behavior and the manner in which it should be carried out. It is noteworthy that the administrators of managed hospitals are required by HCA to prepare annual management plans for their hospitals. CX 427V; Pust 3650, 3653–54; *see* CX 28; CX 191.

Finally, whatever role managers in this market may play, it has not discouraged them from exchanging sensitive information about prices and wages with other administrators nor from attempting to organize concerted opposition to certificate of need proposals. *E.g.*, Smith 1961, 1981–82; Bennett 3719. Indeed, the Downtown General and Red Bank hospital boards might well encourage profitable anticompetitive behavior, since it would be advantageous to the managed hospitals as well as to HCA-owned hospitals. As discussed in greater detail below, the Red Bank board members themselves in fact signed a market allocation agreement with a competing firm. *See infra* section V.E.

In short, we find that considering managed hospitals to be [41] entities independent of HCA in examining an increased likelihood of competitive behavior in this market strains credulity. Doing so would seriously understate the likelihood of competitive harm in the Chattanooga urban area from HCA's acquisition of HAI. The evidence compels us to consider the market shares of Downtown General and Red Bank as part of HCA's market share in considering the effect on

[11] We also note that HCA maintains a renewal rate for its management contracts of approximately 95%. Main 3751; Pust 3660.

competition in this case.[12] Even were the evidence not as compelling, we would consider HCA's management of the two hospitals to greatly enhance the likelihood of collusion in this market.[13] [42]

HCA's arguments in response are without merit. HCA argues that because a fixed fee is paid to it for management services, regardless of the profitability of the managed hospitals, any incentive to collude is mitigated. We disagree. First, higher prices or lower quality services at the managed hospitals would protect owned hospitals and others involved in an anticompetitive scheme from being undercut or outdone by the managed hospitals. Second, HCA in any case could set its prices and other competitive variables at owned hospitals more effectively with full appreciation of its managed hospitals' pricing and other competition policies.

Furthermore, we do not believe that the boards demonstrated their lack of reliance on their managers by seeking, before these acquisitions, renegotiation of the original HAI management contracts when Medicare refused to allow the full management fee under those contracts as a proper cost.[14] We would expect [43] hospital boards that intend to and do rely heavily on a management company to determine how their hospitals will be run to show a keen interest in obtaining the best possible management at the lowest cost.[15]

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[12] We note that HCA believes that management of hospitals for other owners gives it more "control over the environment" in which hospitals operate and "expands [its] market share." CX 208C; CX414A.

[13] Although, as Complaint Counsel concede, no case has yet specifically addressed on the merits the status of hospital management contracts in a hospital merger case, inclusion of the two contracts in HCA's market share is certainly consistent with what case law does exist on hospital mergers and the case law interpreting Section 7 of the Clayton Act generally. *See American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 589, 605 (E.D. Pa. 1977) (in preliminary injunction proceeding, court found that plaintiff had demonstrated a likelihood of success on the merits regarding its allegation that a hospital merger would likely substantially lessen competition or tend to create a monopoly because, as a result of the acquisition, defendant would "own or manage" the only two hospitals in the area); *United States v. Archer-Daniels-Midland Co.*, 584 F.Supp. 1134, 1139 (S.D. Iowa 1984) (court held that the lease of operations of one firm by another was an "acquisition" within the purview of Section 7 since to hold otherwise would permit the adroit use of leases to frustrate the procompetitive purposes of the Clayton Act). Indeed, Section 7 "is primarily concerned with the end result of a transfer of a sufficient part of the bundle of legal rights and privileges from the transferring person to the acquiring person to give the transfer economic significance and the proscribed adverse 'effect.' " *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 182 (S.D.N.Y. 1960). As we have seen, with its acquisition of the Downtown General and Red Bank management contracts, HCA obtained sufficient influence over the managed hospitals to coordinate behavior and lessen competition.

[14] HAI previously owned the two hospitals that became Downtown and Red Bank. Stulce 1174; Chambliss 1425–26; Kantanie 1040. When the hospitals were in need of replacement, HAI arranged for the two hospitals to be owned by newly organized non-profit corporations, the boards of which were selected by HAI, so that new hospitals could be built with tax-free bonds. Kantanie 1047–49, 1051–52, 1075–76, 1079; Smith 2026; Chambliss 1425; Stulce 1178. HAI arranged to manage the two hospitals under long-term, 25-year contracts with management fees set at 8% of the hospitals' gross revenues. Kantanie 1052, 1075–76, 1079; CX 185A, Z–1 - Z–2; CX 624F, H; Stulce 1178; Chambliss 1425. These two management contracts were unusually favorable to HAI, with very high management fees. Kantanie 1054. The contracts were later renegotiated with fixed fees resulting in much lower management fees and shorter terms, after the Medicare intermediary refused to reimburse the hospitals for much of the management fees because HAI and the hospitals were found to be "related" parties. Chambliss 1442; Stulce 1193; Smith 1972.

[15] Likewise, we attach no significance to the decisions made by Medicare that HCA's predecessor in interest, HAI, and the managed hospitals were not "related persons" under the renegotiated contracts. *See* I.D.F. 198–99. The determinations concerned the integrity of the reimbursement system—whether the managed hospitals could claim they had made payments to HAI that were reimbursable. *See id.* They do not reflect a lack of power to influence the hospitals' competitive strategies. Indeed, HCA admits that the Blue Cross determinations are "perhaps not directly controlling here." RAnB at 11.

(footnote cont'd)

Though HCA maintains a separate corporate subsidiary for managed hospitals, we do not think that the separation of management services from the operations of owned hospitals within the HCA corporate structure precludes successful coordination in this market. Certainly, it has not precluded joint meetings in Chattanooga of HCA administrators from both types of hospitals and the formulation of an "areawide plan" to coordinate the activities of both owned and managed hospitals in Chattanooga. *See supra* this section. In any case, company-wide efficient organizations should not be a bar to coordination among local [44] administrators where collusion is sufficiently attractive to the administrators.

HCA does not contend as a legal matter that the acquisition of these management contracts falls outside the purview of Section 7. Nevertheless, because the potential harm to competition from HCA managing its competitors is so clear in this case, we hold that the acquisition of a management contract that may substantially lessen competition or tend to create a monopoly violates Section 5 of the Federal Trade Commission Act independently of a violation of Section 7 of the Clayton Act. *See General Motors Corp.*, 103 F.T.C. 641, 700 (1984), and cases cited therein; *see generally* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227, 251, 271 (1980).

B. *The Nature of Competition Among Chattanooga Hospitals*

Traditionally, hospitals have competed for patients in three general ways: first, by competing for physicians to admit their patients; second, by competing directly for patients on the basis of amenities and comfort of surroundings; and third, by competing to a limited degree on the basis of price. Salkever 2332–38. The first two constitute "nonprice" or "quality" competition, and by far have been in the past the most important of the three. *Id.*

Non-price competition for physicians includes the provision of up-to-date equipment, a qualified and reliable nursing staff [45] and other technically trained personnel, convenient office space to make it easier for the physician to concentrate both his ambulatory and inpatient work within the same location, a nice doctors' lounge with a good selection of journals—everything that will convince physicians that their patients are receiving the best care possible and make physicians' lives more comfortable. *Id.* at 2333. Competition directed at patients themselves has traditionally been through the provision

We also reject any suggestion that under the renegotiated contracts, the management company had less authority. The evidence is conclusive that management under the old and new contracts did not differ and that HCA played the same role as manager that HAI did both before and after the original Downtown General and Red Bank contracts were renegotiated in response to the Medicare disallowance. Chambliss 1440–41, 1449, 1451; Smith 1975–77; Pust 3649; Bennett 3708; Stulce 1197–98.

of amenities, such as pleasant surroundings, attractive rooms, televisions and telephones, high nurse-to-patient ratios, convenient parking—everything that will make patients more comfortable. *Id.* at 2334.

Price competition, on the other hand, was much more limited in the past than non-price competition. Hospital prices meant little to patients because by the mid–1970s they were almost completely insured. *Id.* at 2335–38. Patients were paying only a minimal amount out of their own pockets for hospital care. Moreover, health care fringe benefit costs were not a large portion of total costs for employers. *Id.* Employees desired the non-taxable income of health care benefits and, consequently, sought the best insurance plans possible in their benefits packages. Insurers weren't concerned about price because employers and employee groups, their primary customers, weren't concerned about insurance costs. *Id.* The result of this price insensitivity by consumers, their employers and their third-party payors was that little incentive was given hospitals to bid patients away from other hospitals by maintaining lower prices [**46**] and informing third-party payors and customers of those lower prices. *Id.* at 2335. Instead, a more "indirect" form of price competition took place. Afraid of losing patients because of a public perception that they were more expensive than their competitors, hospitals felt some constraint on raising prices. *Id.* However, because of the state of the third-party payment mechanism, hospitals did not compete vigorously on the basis of price. *Id.* at 2336.

Over the last decade, two major trends increasing competition among hospitals beyond its traditional limits have developed. *Id.* at 2338–50. First, both non-price and price competition are now being directed much more toward patients themselves than in the past. Second, beginning in the late 1970s the hospital industry has seen the clear emergence of direct price competition. At the same time, traditional non-price competition for patients on the basis of amenities has intensified somewhat, through the provision of such amenities as private rooms. Non-price competition for physicians remains pervasive, since physicians still largely determine the disposition and treatment of their patients. *Id.* at 2338–41, 2348.

Increasing competitive efforts aimed directly at patients include health education programs, CPR classes, community activities, and direct mass media advertising, such as on billboards and radio. *Id.* at 2339–40, 2348. The clear emergence of direct price competition is even more striking. Hospitals are now trying to attract the business of employers and insurers by [**47**] offering price discounts. *Id.* at 2342–43. The reason for this increase in price competition is a reaction in the health insurance market to rising costs.

Total health care and hospital costs in the United States have grown precipitously over the past several years. *Id.* at 2342, 2348–50; CX 812C. HCA itself has predicted that "total expenditures for health care services and products [are] likely to continue to rise at a rate which will alarm purchasers of health services." CX 209Z–8 (1981); *see* I.D.F. 242. The rapid rise in health care costs finally began to impact seriously on employers, employee groups and third-party payors. Salkever 2342–43. Health benefits, which were once a small element in employers' total payroll, suddenly became a major element in their cost structures, accounting for as much as 15 or 20% of total payroll cost. *Id.* at 2342; Barth 844–5. Moreover, where plans in which employees paid part of the health insurance premium out of their own pockets were operative, employees felt the same pressures because premiums were rising rapidly. Salkever 2342. Even where employees weren't paying part of the premiums themselves, employee organizations such as unions realized that the other benefits in their overall benefits packages were dropping because of the increasing cost of health care benefits. *Id.* at 2343.

The result of rising insurance costs has been a change in employer and employee concern that in turn has changed insurer behavior. Insurers realized that there was a market for cost containment and have reacted by providing new insurance packages [48] and by marketing cost containment services. *Id.* at 2343–4.

New insurance packages include alternative forms of health care delivery, such as Health Maintenance Organizations ("HMOs") and Preferred Provider Organizations ("PPOs"), and higher first dollar deductibles and coinsurance in health care policies. *Id.;* Barth 849–66. HMOs and PPOs operate as group purchasers of health care services. I.D.F. 249. An HMO is a plan in which a subscriber prepays a fixed fee in return for comprehensive health care. Harris 3850; I.D.F. 250. HMOs typically maintain contractual arrangements with physicians and hospitals to provide care to subscribers who as a result generally have lower health care expenditures than other patients. Harris 3850–51; I.D.F. 250. Studies have shown that HMOs influence hospital competition and have been increasingly successful in obtaining discounts from hospitals. *See, e.g.*, RX 1126(1),(3),(6). According to HCA's President and Chief Exercutive Officer, "[a] successful HMO will help make other providers in a given market more responsive to consumers, as well as more cost conscious." CX 123E. HMOs thus act as additional buyers for which hospitals must compete, on price as well as quality terms.

A PPO is an arrangement whereby health care providers contract to provide services at a discount to volume purchasers of health care, such as employers or other third-party payors. CX 616I; I.D.F. 251.

There is generally a financial incentive for the group members or patients to use the "preferred" providers, such as a waiver of deductibles or coinsurance. CX 309; I.D.F. 251. Industry now commonly negotiates with health [49] care providers for discounts. Williamson 3269. A good example of such an arrangement is the PPO recently created by HCA in Florida, on a discounted fee-for-service basis. CX 616. The HCA PPO is "designed to introduce a new competitive element into the comprehensive health care market." CX 616J.

Higher first dollar deductibles and coinsurance in health care policies mean that patients are now paying more of the costs of hospitalization out of their own pockets. *See* Barth 851, 855; CX 534X; RX 1105(9). Recent studies have shown that health care expenditures vary depending upon how much of the cost of health care is borne by the consumer and that price has some effect on consumers' decisions to seek health care in the first place. CX 885 at v; CX 894D. Any time patients pay more out of their own pockets, we would expect some increased sensitivity to prices. "Stop-loss" provisions that limit the total out-of-pocket expenditures of patients under their insurance policies are common, however, and we therefore would not expect patient out-of-pocket expenditures in themselves to tremendously increase price competition among hospitals for inpatients. *See, e.g.*, Lamsey 1802–04 ($1500 stop-loss). If a major illness or injury occurs, the patient will have to pay the same amount out-of-pocket wherever he goes, *unless* his third-party payor is willing to waive the deductible and coinsurance if he uses a lower-priced provider. Indeed, this is precisely the manner in which attempts to control costs through greater deductibles and coinsurance foster significant price competition among hospitals. *See, e.g.*, Stern 574 (price discounting by hospitals can take the form of [50] not charging for co-payments). For example, HCA itself has created its own health insurance plan with financial incentives, such as lower deductibles and coinsurance, designed to encourage subscribers to use HCA hospitals. CXs 809–13.

In addition, insurers are not simply selling insurance but also marketing "cost containment" services to employers—the ability to assemble data on prices of services provided by alternative providers as well as the ability to monitor claims and to hold down costs by reducing utilization, a process known as "utilization review". Salkever 2345; Barth 841–46. Finally, employers nationwide are trying to contain health care costs by forming coalitions to develop data bases on alternative prices for different providers, making comparison shopping easier. Some employers are even directly counseling employees to use cheaper providers that still provide good quality care. Salkever 2346–47.

In sum, this increasing concern of employers and employees with

the costs of insurance means that differences in prices between hospitals matter to them and their third-party payors, since insurance will cost less when hospital care costs less. Salkever 2347; *see supra* section I.B. The result is that hospitals are now far more likely to present themselves to insurers, employers and employee groups as less costly than their competitors as one method of attracting more business. *Id.* Price competition, fostered by these new insurance mechanisms, is therefore growing in the hospital industry. *See* Salkever 2341–4, 2347; Kantanie 1094; CX 309B; CX 616. [**51**]

HCA's claim that any increase in price competition among hospitals is insignificant is belied by its own records. HCA itself has predicted a "more price competitive environment" for hospitals because of increased pressure from private industry to reduce hospital expenses. CX 421Z–2; *see, e.g.,* CX 100H. HCA planners have noted the sensitivity of major purchasers of health care to rising costs, which should "stimulate considerable competition among health care providers." CX 209H; *see also* CX 108Z–1. Another HCA document reflects the belief that "increasing competition in the health care sector . . . will allow natural market forces to slow the price rise spiral." CX 221Z–2; *see, e.g.,* CXs 357, 209Z–17–18.

Moreover, the rise of price competition is reflected in HCA's policy that its hospitals should attempt to keep their charges at a competitive level. Its 1982 form 10–K states that "[t]he rates charged by the Company's hospitals are intended to be competitive with those charged by other local hospitals for similar accommodations, supplies and services" (CX 13Q); and the 1983 Management Plan for HCA East, the division that includes Chattanooga hospitals, states that "[p]rices are budgeted to increase at the maximum competitive level in each local market." CX 110X. Because of the rise of health care costs and the resultant reaction by purchasers, HCA believes it has an opportunity to "captur[e] additional patients in areas where price competition becomes more important and we are the low cost provider." CX 209Z–10. HCA is also concerned about price discounting by its competitors. CX 209"O"; I.D.F. 248. The I.D.F. 248. The [**52**] record thus establishes the emergence and likelihood of increased price competition among hospitals because of pressures from buyers.

Both the traditional forms of non-price and price competition are evident in Chattanooga, as well as the emerging trends, though changes such as the development of HMOs and PPOs are proceeding more slowly than elsewhere. *E.g.,* Salkever 2350–53. The evidence is clear that Chattanooga hospitals compete for physician patronage (*e.g.,* Lamb 134; Stern 547; Petruzzi 697–98), and that they do so in a variety of ways. They compete with respect to the range and quality of services, equipment offerings and the quality of hospital personnel

they provide. *E.g.*, Lamb 171–73; Stern 556–7; Petruzzi 721–25; Kantanie 1093; Parkhurst 1390–92; Furrey 1539–40. For example, Erlanger recently updated its heart catheterization equipment in response to the better quality of Memorial's. Lamb 174–75. Chattanooga hospitals also compete for physician admissions by providing office space close to the hospital, and other physician amenities. *E.g.*, Stern 556–57; Petruzzi 723; Parkhurst 1390–91. They further compete for physicians by providing a pleasant environment and the amenities that keep the physicians' patients satisfied. *E.g.*, Parkhurst 1390–91. Hospitals compete for patients by offering personalized care, attractive facilities, private rooms, parking, televisions, telephones, good meals and quality nurses. *E.g.*, Lamb 171, 182; Stern 560–62, 569; Furrey 1546.

Moreover, the testimony of hospital administrators is overwhelming that Chattanooga area hospitals compete in some [53] manner on the basis of price. Lamb 176–78; Stern 560; Petruzzi 727; Furrey 1525, 1537; Kantanie 1060–61; Smith 1955. The price competition that has traditionally existed in Chattanooga is meaningful enough that competition could be harmed substantially if it is restricted. *See AMI*, slip. op. at 4–9, 32–33. For example, the Blue Cross participating hospital system is a form of this price competition that has existed for years. Under the plan, hospitals become members of Blue Cross and Blue Shield of Tennessee and agree to charge only Blue Cross-approved prices to Blue Cross subscribers in order to attract them as patients. Long 1280, 1285. Blue Cross has a large number of subscribers who receive higher amounts of reimbursement if they are treated at member hospitals. *Id.* at 1291–92. The result is a strong incentive for hospitals to participate in the program; indeed, all of the Chattanooga urban area hospitals are member hospitals. *Id.* at 1304. This is "price competition" because if a hospital unilaterally refuses to deal with Blue Cross at the desired rates, it will lose business to competing hospitals that are willing to charge lower rates for Blue Cross subscribers.

Moreover, the evidence shows that hospital rates in Chattanooga are established with at least some reference to the rates of other hospitals. *See, e.g.*, CX 177B; CX 139Z–53; CX 239. Formal and informal rate surveys have been used by area hospitals to determine whether the surveyor's prices were within the range of prices offered by competing hospitals or to justify price increases to Blue Cross. *E.g.*, Stern 564, 632–39; Smith 1958–61, 1965–66; CX 845. Almost every hospital in the [54] Chattanooga urban area has conducted rate surveys at one time or another or participated in them. *E.g.*, CX 179 (Diagnostic); CX 184 (Downtown General); CX 276 (Parkridge); CX 286 (Red Bank); CX 316I (Erlanger); CX 326H (Tri-County); CX 845 (Medi-

cal Park); CX 158 (Memorial participated); CX 161 (East Ridge participated); I.D.F. 225. In some instances, surveys and informal rate inquiries have concerned not only current prices but prospective prices. CX 184G; CX 239A; Kantanie 1134; Lamb 206.

The surveys in the record list room rates at other hospitals and charges for a number of ancillary services. *See, e.g.*, CX 179; CX 184; CX 286. In fact, those hospital rates tended to fall into a pattern in Chattanooga prior to the challenged acquisitions, with Erlanger's prices being the highest, Memorial's the lowest, and the other hospitals' rates somewhere in the middle. *E.g.*, Lamb 176, 208; Stern 566; Kantanie 1070–71; CX 239; I.D.F. 226. Other hospitals in Hamilton County tried to set their prices not too far above Memorial's and somewhat below Erlanger's. Kantanie 1070–71. Finally, the importance of rates to area administrators is reflected by the fact that rates were often discussed informally at meetings or over the telephone. *E.g.*, Lamb 206–09; Stern 577.

HCA's Parkridge Hospital has long been concerned that its rates were significantly higher than Memorial Hospital's. CX 18Z–97; CX 139Z–53; CX 301Z–50. In 1978, Parkridge increased recovery room and anesthesia rates, instead of the more visible operating room rates, "for competitive reasons." CX 301Z–50. A 1982 Parkridge management plan also discusses Memorial's lower [**55**] prices (CX 18Z–65; CX 18Z–97), and concludes than Parkridge "must price itself more by looking at the local competition." CX 18Z–67; *see also* CX 18Z–63, 64, 66; CX 38Z–96; CX 139Z–53. The plan notes that "competing hospitals have chosen to hold down price and charge increases for 1983 significantly lower than Parkridge." CX 18J.[16]

Thus, it is obvious that price has been a competitively sensitive matter among Chattanooga hospitals. *See* Lamb 177–78. We do not here conclude that price has been the prime arena in which hospitals in Chattanooga compete. However, we do think it clear that even though rates are not constantly adjusted due to a changing price structure, they have been periodically set with some reference to what the market will bear in face of the prices of other hospitals. *See, e.g.*, Kantanie 1069–70.

It is clear that Section 7 protects whatever price competition exists in a market, however limited. *AMI*, slip. op. at 33 ("[T]he antitrust laws will endeavor to protect this price competition, if, for nothing else, the hope that price competition will be enhanced"); *see United States v. Philadelphia National Bank*, 374 U.S. 321, 368–69 (1963); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972), *cert. denied*,

[16] Other HCA hospital management plans contain similar statements reflecting HCA's concern with remaining competitive on prices and price increases. CX 20Z–65 (North Park); CX 28H (Downtown); *see also* Williamson 3269; Main 3762–63; CX 421Z–2; CX 209"O".

412 U.S. 928 (1973). HCA, of course, admits that this price competition should be protected if it is endangered. RAB at 33. Indeed, the [56] fact that price competition is limited does not mean that consumers cannot be hurt substantially by its curtailment. For instance, any agreement among hospitals to refuse to accede to rates requested by Blue Cross, even under the traditional plan, would harm Blue Cross and its subscribers. *See* discussion *infra* section V.E.

There is, however, even more reason to conclude that price competition could be harmed by these acquisitions. The evidence shows that the industry-wide growth in price competition has taken root as a market phenomenon in the Chattanooga area. Price competition is increasing and appears likely to further increase significantly among Chattanooga hospitals.

Because employers and employee groups in the Chattanooga area are experiencing severe cost increases, they have been forced to make significant changes in their employee health benefit plans. Lamb 179; Henson 967–78; Siskin 1232–33; Lamsey 1806–13. For example, Provident Insurance Company's model insurance plan, which it both markets and uses for its own employees, calls for 20% coinsurance and a 100 to 150 dollar deductible that employees must pay out of their own pockets. Barth 852–53. It is designed both to save employers money and to give employees incentives to seek less costly health care. *Id.* at 851. Siskin Steel Company changed from a plan providing basic benefits for hospitalization with no deductible or coinsurance to a plan with a 100 dollar deductible and 20% coinsurance for hospitalization. Siskin 1232, 1242–3. American Manufacturing Co. went from a similar basic benefits plan to a plan with a 200 [57] dollar deductible and a 20% coinsurance payment up to a $1500 stop-loss. Lamsey 1802–04; I.D.F. 243. Blue Cross also offers a comprehensive plan with a deductible ranging from 100 to 250 dollars and a 20% coinsurance amount up to some stop-loss level. Long 1295–96. Blue Cross now sells more of these plans than its traditional basic coverage. Long 1297; I.D.F. 243. These changes are intended to encourage employees to become more cost conscious and therefore at least to some extent to be more sensitive to differences in the prices charged by different health care providers. Siskin 1234; Barth 851. In fact, the evidence shows some increased price sensitivity on the part of consumers. *See, e.g.,* Lamb 179 ("Patients do comparisons. They shop around some . . . [A]s insurance coverages change and patients become more a part of paying the cost of their own hospital bills they are becoming more concerned about their cost."); CX 605, Petruzzi 726.

Following the industry trend, some Chattanooga area employers have been counseling their employees in an effort to persuade them to seek health care from low cost providers. Roddy 1913–14; Siskin

1234; *see* Lamsey 1816. In response to Memorial's encouragement, various companies have urged their employees to utilize Memorial Hospital because of its low costs. CX 601; CX 605; Furrey 1533; Roddy 1915; Siskin 1236, 1241–42. Moreover, employers are developing data bases so that the prices of services provided by different health care providers can be more effectively compared. *See* Siskin 1236; Lamsey 1816; Barth 865, 870–71; Salkever 2346. [58]

As a result of these phenomena, Chattanooga hospitals are beginning to show the signs of more direct price competition. Memorial has encouraged employers to steer employees to it on the basis of its lower prices and concurrent high quality, and has disseminated newsletters to Chattanooga industries encouraging price shopping for health services and preadmission counseling of employees. *E.g.*, CX 601; CX 605; Furrey 1533. Memorial has urged employers "to identify the hospital which is giving your employees the best service for the least dollar amount" and "to take a look at the price differential among hospitals. . . ." CX 601. East Ridge has advertised emergency room price lists and its publications explain the pricing system at the hospital and urge prospective patients to inquire about hospital accommodations and rates when hospital-shopping. Petruzzi 703–04; CX 255D; CX 265.

In addition to increasing price competition, the evidence clearly shows significant marketing directly to patients by Chattanooga area hospitals. East Ridge has advertised its emergency room prices on television. Petruzzi 703–704. Metropolitan also advertises on television. Kantanie 1102. Chattanooga hospitals advertise new procedures and equipment in newspapers. Coddington 487–88; Furrey 1537. In order to compete, Red Bank advertises on the radio and billboards. Smith 2000; Stern 574. Chattanooga hospitals also make direct mailings and distribute promotional literature to individuals. Petruzzi [59] 699–705, 710; Parkhurst 1394. The evidence further shows that advertising is increasing in Chattanooga. Lamb 180–81.[17]

[17] The importance to our analysis of the emerging competition in the health care industry is essentially acknowledged by HCA, we think, in its attempt to exclude relevant post-acquisition evidence in this case. HCA argues that these acquisitions should be judged by the facts as of the time the acquisitions occurred and that those facts indicate no likely lessening of competition.

We reject HCA's attempt to exclude this evidence for two reasons. First, it presumes that this post-acquisition evidence does not "illuminate the validity of arguments relating to a possible lessening of competition based fundamentally upon market dynamics at the time of the acquisition." RAB at 52. HCA is simply wrong. The record is conclusive that the trends toward both nationwide and in Chattanooga toward greater price and non-price competition, advertising and other marketing, patient awareness, and the cost pressures that spawned those trends, were well underway before the 1981 acquisitions at issue here. *E.g.*, Salkever 2348–50; Lamb 180–81; Stern 561, 573, 649; Furrey 1547, 1553; Barth 845, 856, 894; Roddy 1912; Petruzzi 726. Thus, post-acquisition evidence relating to these trends does "illuminate"the acquisitions' likely effects on future competition evident at the time of the transactions.

Second, and more fundamentally, considering this post-acquisition evidence is appropriate here. While exculpatory post-acquisition evidence of voluntary actions by the acquiring firm may be inappropriate for determining the legality of an acquisition, it is appropriate to consider changes in the market that are beyond the control of the acquiring firm and that are relevant to the effects of an acquisition. *United States v. General Dynamics Corp.*, 415 U.S. 486, 504 (1974); *see* n. 10 *supra*. Clearly, the changing market conditions nationally and in the Chattanooga area are beyond HCA's control and are relevant to the effects of these acquisitions; post-acquisition evidence of those trends is therefore appropriately considered here.

Finally, we note that Chattanooga hospitals compete in the recruitment of qualified medical personnel, such as nurses and laboratory technicians. *E.g.*, Lamb 171; Furrey 1546, 1560; Stern 569–70; I.D.F. 224; *see, e.g.*, CX 18Z–47. The evidence shows that they offer salaries and benefits competitive with other [**60**] hospitals to retain their personnel. *E.g.*, Stern 569–70; Furrey 1560; Smith 2006; CX 143, p. 25; CX 163; I.D.F. 224. Therefore, any analysis of the likely effects on competition from these acquisitions may also consider competition for inputs.

C. *Respondent's Market Share and Concentration in the Chattanooga Urban Area*

Three ways to measure a hospital's share of the acute care hospital services market are by using: (1) bed capacity; (2) inpatient days; and (3) net revenues. Bed capacity and inpatient days measure a hospital's position with regard to the cluster of inpatient services, the heart of hospital care. Net revenues, on the other hand, account for both inpatient and outpatient services.

Naturally, because of their proposed market definitions, Complaint Counsel advocate use of inpatient measures, while HCA urges net revenues as the preferable measure since it accounts for outpatient services. We conclude, however, that the three measures are so similar in this case that they yield the same result whatever measure is used.

The following table demonstrates clearly the significance of concentration in the Chattanooga urban area and the rise in concentration and HCA's market share, including managed hospitals, because of the acquisitions. [**61**]

Concentration Statistics for the Chattanooga Urban Area

Based on:	Before acquisitions	After HAI acquisition	After HCC acquisition
1981 approved acute-care beds:			
HCA market share	13.6%	22.9%	26.7%
2–firm concentration ratio	51.8%	58.7%	62.5%
4–firm concentration ratio	76.3%	85.6%	89.4%
Herfindahl index	1932	2242	2416
1981 patient days:			
HCA market share	13.8%	23.0%	25.8%
2–firm concentration ratio	54.8%	58.6%	61.4%
4–firm concentration ratio	79.7%	88.9%	91.7%
Herfindahl index	2028	2338	2467
1981 net patient revenues:			
HCA market share	14.3%	22.9%	25.5%
2–firm concentraton ratio	56.2%	62.4%	64.9%

4–firm concentration ratio	80.9%	89.5%	92.1%
Herfindahl index	2220	2515	2634

SOURCES: RX 1092, RX 1094; CAB at B–3; RX 986 (402); CX 612; CX 92J; CX 106K. **[62]**

The Herfindahl-Hirschman Index ("HHI") of market concentration is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI reflects the distribution of market shares between firms and gives proportionately greater weight to the market shares of the larger firms, which likely accords with their relative importance in any anticompetitive interaction. U.S. Department of Justice Merger Guidelines (June 14, 1984) ("DOJ Guidelines") § 3.1; *FTC v. Bass Brothers Enterprises,* 1984–1 Trade Cas. (CCH) ¶ 66,041, at 68,609 (N.D. Ohio 1984). As seen from the table, using any measure of market power the Herfindahl index was above 1900 before the acquisitions. Thus, the acquisitions occurred in a market already highly concentrated. *Bass Brothers* at 68,620–21; DOJ Guidelines §3.1. Following HCA's acquisition of HAI, the HHI increased some 295 points using net patient revenues and over 300 using beds or patient days. With the acquisition of HCC, the HHI additionally increased well over 100 points using any measure. Again using any measure, the HHI at the very least rests at 2416 after the acquisitions. We consider such an increase in concentration in an already concentrated market to be of serious competitive concern, all other things being equal. *See Bass Brothers* at 68,620–21; DOJ Guidelines § 3.11.[18]

More traditional measures of market share also support this conclusion. For example, using patient days HCA's market share **[63]** increased from 13.8% to 25.8% in the Chattanooga urban area, while four-firm concentration increased to almost 92% and two-firm concentration to 61%. The figures for approved beds and net patient revenues are almost identical. These figures support an inference of harm to competition, all other things equal. *See, e.g., United States v. Philadelphia National Bank,* 374 U.S. 321, 364–65 (1963); *Liggett & Meyers, Inc. v. FTC,* 576 F.2d 1273, 1275–76 (4th Cir. 1977); *Marathon Oil Co. v. Mobil Corp.,* 530 F.Supp. 315, 323–24 (N.D. Ohio), *aff'd,* 669 F.2d 378 (6th Cir. 1981), *cert. denied,* 455 U.S. 982 (1982); *see also* F. Scherer, *Industrial Market Structure and Economic Performance* 280 (2d ed. 1980); R. Posner, *Antitrust Law: An Economic Perspective* 55–56 (1976).[19]

[18] Even excluding Red Bank from this calculus, the HHI jumps over 200 points, from 1932 to 2136, because of the HAI acquisition alone using beds, and almost 200 points using net patient revenues or patient days.

[19] Additionally, with four-firm concentration so high, the "fringe" firms should be able to "compete away" very little business from the largest firms should the largest firms collude, if barriers to expansion are significant. With the significant barriers to entry and expansion in this market, discussed below, such firms could not likely expand to make collusion among the larger firms unprofitable. Salkever 2364–66.

Moreover, all other things being equal, an increase in market concentration through a reduction in the absolute number of competitive actors makes interdependent behavior more likely. *E.g,* Salkever 2366–67; Harris 4244–46; F. Scherer, *Industrial Market Structure and Economic Performance* 199–200; 2 P. Areeda and D. Turner, *Antitrust Law* ¶ 404 (1978). These **[64]** acquisitions decreased the number of independent firms in the market from 9 to 7.[20] The costs of coordination or of policing any collusive agreement are less with fewer participants, and the elimination of competitive forces in this market facilitates joint anticompetitive behavior. *See* Salkever 2366–67.

In sum, evidence of the increased concentration caused by these acquisitions points toward a finding of likely harm to competition, all other things being equal.[21] HCA's acquisitions have made an already highly concentrated market more conducive to collusion by eliminating two of the healthiest sources of competition in the market and increasing concentration substantially. But all other things are not equal in this market, and statistical evidence is not the end of our inquiry. In the absence of barriers to entry, an exercise of market power can be defeated or deterred by the entry or potential entry of new firms regardless of the structure of the existing market. *See, e.g., Echlin Manufacturing Co.,* No. 9157 (June 28, 1985). [105 F.T.C. 410]. We now turn to the issue of entry barriers and conclude that they confirm and even magnify the inference to be drawn from **[65]** the concentration evidence in this case.

D. *Barriers to Entry*

Complaint Counsel urged below that state certificate of need legislation constitutes a barrier to entry into the Chattanooga acute care hospital market that must be considered in the assessment of the probable anticompetitive impact of these acquisitions. Not surprisingly, HCA argued that such laws do not constitute a barrier to entry in the Chattanooga market. Judge Parker sided with neither. Rather, he found that while the CON requirements do not prohibit entry, they significantly delay it. I.D. at 87–88.

Some discussion of the state regulatory environment is necessary in order to evaluate this debate. Both Tennessee and Georgia require certificates of need ("CONs") for, among other things, the establishment of acute care hospitals, expansion of bed capacity, significant capital expenditures, and changes in the services that they offer.

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[20] Even excluding HCA-managed hospitals from this calculus, the decrease in firms caused by the acquisitions is from 11 to 9—a drop of almost 20% in the absolute number of competitors.

[21] Each acquisition occurred in an already highly concentrated market and the increases in concentration from each acquisition were substantial. Our conclusion in this case therefore applies to the two acquisitions viewed separately as well as collectively. Since both parties generally treated the two acquisitions collectively throughout this proceeding, we will for the sake of simplicity refer to the acquisitions collectively.

Tennessee Health Planning & Resources Development Act of 1979, Tenn. Code Ann. Sec. 68–11–101 to –107 (1983 & Supp. 1983), *as amended by* Act to Amend Tennessee Health Planning & Resources Development Act, Pub. Ch. No. 814 (May 25, 1984) ("THPRDA Amendments of 1984"); Ga. Code Ann. Sec. 31–6–1 to –50 (Supp. 1983); *see* I.D.F. 252. Under Tennessee law a CON may be granted for a project only if it is "necessary to provide required health care in the area to be served . . . and will contribute to the orderly development of adequate and effective [**66**] health care facilities and/or services." Tenn. Code Ann. Sec. 68–11–106(h)(2), *as amended by* THPRDA Amendments of 1984. A CON may be granted in Georgia only if the project is "needed." Ga. Code Ann. Sec. 31–6–40(a) (Supp. 1983); *see* I.D.F. 254. This much is clear—one cannot simply enter the market.

The procedures for obtaining a CON in Tennessee, as well as the similar procedures in Georgia, involve several stages. An application for a CON is first submitted to the Tennessee Health Facilities Commission ("THFC"). After the THFC staff determines that the application is complete, a "review cycle" begins. An "interested party," *e.g.* a competitor, has a right to demand a public hearing in the geographic area in which the project is to be located. Tenn. Code Ann. Sec. 68–11–106(i)(2), *as amended by* THPRDA Amendments of 1984. The CON application is reviewed by the Tennessee state health planning and development agency, currently the Department of Health and Environment. Tenn Code. Ann. Sec. 68–11–104(a) (Supp. 1983); *see* I.D.F. 255. The Department of Health and Environment then reports the results of its review to the THFC. Tenn. Admin. Comp. ch. 0720–2–.03 (6), (8), and (9). The THFC then makes its *initial* decision on the CON application. That initial decision may then be appealed by the applicant, persons who have previously participated in the proceeding, such as a competitor, and any other person upon a showing of good cause. Tenn. Code Ann. Sec. 68–11–106(l)(1) (Supp. 1983). Upon such appeal, the THFC holds a public hearing, which is supposed to be commenced within 45 days after the appeal is filed. Tenn. Code Ann. Sec. 68–11–106(l)(2) (Supp. 1983). [**67**] The THFC then decides the appeal within 45 days of the hearing. Tenn. Code. Ann. Secs. 68–11–106(l)(3). The THFC decision on appeal is then subject to judicial review at the instance of any "aggrieved" person. *Id.;* Tenn. Code Ann. Secs. 4–5–322(a) (1983); *see* I.D.F. 255.

The Georgia CON process is fundamentally similar to that of Tennessee. *See* Ga. Code Ann. Secs. 31–6–43 to –44 (Supp. 1983); Ga. Admin. Comp. ch. 272–2–.04; I.D. at 56 n. 14. However, Georgia not only regulates health facilities under its CON program, but also indirectly regulates them through another review of health facility capital expenditures, pursuant to an agreement with the Federal

Government under Section 1122 of the Social Security Act. 42 U.S.C.A. Sec. 1320a–1 (West 1982); 42 C.F.R. 100.101–.109 (1983); Ga. Code Ann. Sec. 31–6–50 (Supp. 1983); Ga. Admin. Comp. ch. 272–3–.01 to –.03; I.D.F. 256.

As the foregoing amply demonstrates, there is hardly free entry into the acute care hospital industry in either Tennessee or Georgia. Indeed, the CON laws at issue here create a classic "barrier to entry" under every definition of that term. In *Echlin Manufacturing Co.*, we defined a "barrier to entry" to include "additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms." Slip op. at 12; *see* G. Stigler, *The Organization of Industry* 67 (1968); 4 E. Kintner, *Federal Antitrust Law* § 37.4 (1984); 2 P. Areeda & D. Turner, *Antitrust Law* ¶409a (1978); R. Bork, *The Antitrust Paradox* 196 (1978); R. Posner, *Antitrust Law: An Economic Perspective* 59 (1976); Baumol & Willig, *Fixed* [68] *Costs, Sunk Costs, Entry Barriers and the Sustainability of Monopoly,* 96 Q.J. Econ. 405, 408 (1981). We explained that "[t]he rationale underlying this definition is that low-cost incumbent firms can keep prices above the competitive level as long as those prices remain below the level that would provide an incentive to higher-cost potential entrants." Slip. op. at 12.

If a potential entrant desires to build a new hospital in Chattanooga, he must incur all the costs in time and money associated with obtaining a CON. The cost of starting a new hospital includes not only the start-up costs that any firm would incur to enter the market but also the costs of surviving the administrative process. Incumbents in this market, however, did not incur such costs during initial construction. They have only had to incur those costs for additions made to bed capacity since the enactment of the CON laws a decade ago.[22] Incumbents thus [69] have a long run cost advantage over potential entrants. The result is that market power could be exercised by incumbents without attracting attempts at entry as long as supracompetitive profits are not high enough for a potential entrant to justify incurring all the ordinary costs of starting a hospital *plus* the significant costs of obtaining a CON.

[22] The barrier to entry we are chiefly concerned with here is a barrier to adding *new beds* to the market; obviously, any firm seeking to enter the market by constructing a new hospital seeks to add bed capacity to the market. It is true that incumbent hospitals must obtain CONs for adding expensive new equipment or constructing substantial new facilities. But the evidence is clear that the costs of obtaining a CON for new beds, especially for a new hospital, are substantially higher than the costs of obtaining a CON for other purposes. *See, e.g.*, Blank 2083, 2086, 2107, 2112; Stern 587, 591–92. For example, Mr. Stern, former administrator of Medical Park hospital, testified that when HCC applied for a CON to replace the older facility with the new North Park hospital, it did not apply for additional beds; though he expected the replacement facility to be approved, he did not apply for new beds because he fully expected they would not be approved. Stern 587, 591–92. The situation that incumbent hospitals thus face with respect to their already existing bed capacity is much like a cab driver who was issued a medallion to operate his taxi—the medallion, or franchise right, travels with him between autos. Before any other driver can operate at all, however, he must have a medallion. Likewise, it is the high cost of adding new beds to the market that we are concerned with here, since new beds would be necessary to compete away patients from incumbents engaging in profitable anticompetitive behavior.

The evidence is clear that those costs are significant in this market. We agree with Judge Parker that because incumbent hospitals can oppose new entry, even an unsuccessful opposition to a CON application may delay its disposition by several years. I.D. at 87–88; I.D.F. 271–77. Several months are required, as is evident from the Tennessee statute, for preparation of a CON application and for the review process prior to the issuance of the initial decision by the Tennessee Health Facilities Commission. Lamb 241–42; Petruzzi 734–36; I.D.F. 273–74; *see* Blank 2088–89. As is equally evident, the CON process can be further delayed by administrative appeals. In Tennessee, administrative appeals of THFC decisions have suffered from a backlog of about a year. Blank 2100; Petruzzi 735–36; RX 898; I.D.F. 275. Obviously, judicial review of THFC decisions can create further significant delays. For example, judicial review of the March 27, 1979, THFC grants of CONs for additional beds to Parkridge Hospital and Diagnostic Hospital was not completed until January 6, 1981—more than 21 months later. I.D.F. [70] 275. The delays contributed to a total delay between the submission of CON applications and their final affirmance of more than three years. RX 1051(1)–(12); RX 1057(1)–(12); RX 1088(5); I.D.F. 275.

Thus the CON process provides existing hospitals in the Chattanooga urban area ample opportunity to significantly forestall the entry of a new hospital or the expansion of an existing hospital within the area. Indeed, the evidence shows that existing hospitals frequently oppose CON applications when they feel competitively threatened. *E.g.*, Lamb 231–34; Petruzzi 826–7; CX 115; CX 118; CX 127; CXs 129–30; *see* Blank 2091–93. The potential for delay by competitor opposition and costs attendant to such a delay were recognized, for example, by the board of directors of Red Bank Community Hospital in a meeting held after the initial decision to approve a CON for the relocation of Medical Park Hospital to nearby Hixson. *See* CX 186. An attorney who represented the Red Bank board before the THFC in that CON proceeding reported to the board that if it appealed the THFC's decision, there would likely be a delay of about six months before the appeal could be heard, and that while the appeal was pending, Medical Park probably would be unable to obtain financing for the relocation project. Board Chairman Arnold Stulce supported an appeal not only on the hope that it might succeed in blocking the relocation of Medical Park, but also because it would delay the relocation for several months or more—a delay that he recognized would benefit Red Bank. The board authorized the appeal. *Id.*[23] The potential for delay of a [71] new entrant, where opposition may be over-

[23] The appeal was later terminated upon agreement with HCC. *See infra* section V.E.

whelming, is abundantly apparent.[24]

Even this analysis presumes that a CON can be obtained if the costly process is followed through in this market. In fact, the costs of entry include not only the time and expense involved but also the risk that entry will be denied altogether—a risk incumbents did not have to face upon initial entry. Obviously, if entry is being denied, the costs of entry are sometimes prohibitive. Market participants, including some formerly involved in the CON approval process, overwhelmingly testified that it is extremely difficult to obtain a CON for additional beds. *E.g.*, Coddington 482–83; Grimes 3429, 3431–5, 3436; Blank 2085–6; Kantanie 1111–12. For example, Ms. Blank, former executive director of the THFC, observed that it is "very difficult to get the Commission to allow new beds to be [72] constructed" and even more difficult to convince the THFC to approve new hospitals. Blank 2083, 2085–86. Indeed, the last three applications for new bed capacity in the Chattanooga area have all been denied, and the only application for a new hospital in the Chattanooga area since 1974 was denied. CX 890F. Only one CON for new beds in the Georgia portion of the Chattanooga health planning area has ever been approved. CX 302; CX 890.[25] In fact, Judge Parker concluded that "[i]t is doubtful . . . .whether health planning authorities in Tennessee and Georgia will find that any need for additional facilities in the HSA will exist in the forseeable future." I.D.F. 272 n. 16; *see* Salkever 2330–32.

In sum, it is not merely the costs of obtaining a CON that a potential entrant faces, but the significant risk of being denied entry once those costs have been incurred. This risk, which incumbents did not have to face when building their hospitals, in [73] effect raises the costs of entry a significantly greater amount. As a result, many potential entrants may decide not to even attempt entry. *See* Salkever 2330. Indeed, the evidence shows that CON regulation has had a deterrent

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[24] HCA offers calculations purporting to show that the average time it takes to obtain a CON for additional beds "through the administrative process" is less than five months. RAB at 43–44. HCA ignores the time that it takes for judicial review when projects are of sufficient competitive importance to warrant an appeal by competitors. HCA furthermore does not distinguish between those approved applications that were of sufficient competitive significance to warrant opposition and those that were not. None of the proposals by Chattanooga urban area hospitals that involved increases of more than 16 beds, except those automatically "grandfathered" under the Tennessee statute, were approved without judicial review. CX 890B-F. It appears that proposals for additional bed capacity in the Chattanooga urban area may be promptly approved if they are competitively insignificant, but any proposal that would threaten the profitability of incumbent hospitals would likely face years of delay.

[25] HCA claims that since the introduction of the Tennessee CON law, 622 "new" beds have been approved by the THFC for the general Chattanooga area. RAnB at 24. Of those beds, more than two-thirds (455) were "grandfathered"; that is, the applications were required to be approved by the CON statute because their development had already begun before the CON laws went into effect. *See* Tennessee Health Facilities Act of 1973, Pub. Ch. No. 257, § 6, 1973 Tenn. Pub. Acts 996, 1003–04 (repealed 1979); CX 890B-D; RX 1088(1)–(5). Of course, grandfathered beds are irrelevant to our analysis, since they do not bear on the likelihood of future entry. (Moreover, approval of 121 of the remaining 167 beds was substantially delayed by appeals and subsequent litigation. *See* discussion *supra* this section; RX 1088(5)–(6).) When the "grandfathered" beds are disregarded, the statistics show that there has been no new entry into the Chattanooga market since the CON laws were enacted, more applications for new beds by existing hospitals have been denied than approved, and there has been very little growth in capacity in the Chattanooga area. CX 890; RX 1088; CX 646A.

effect in the Chattanooga market. *See, e.g.*, Stern 587, 591–92, discussed *supra* n. 22; Blank 2101; Salkever 2320, 2326–27.

In response to this evidence, HCA argues that the empirical studies in the health economics field do not, in general, support a finding that CON regulation has had a "significant" effect on the addition of new hospital beds. RAB at 41.[26] We find the cited studies ambiguous. First of all, at least two studies have concluded that CON laws are a barrier to hospital bed construction.[27] Second, the studies cited by HCA generally attribute expansions in investment and bed capacity to efforts to secure "grandfathering" to escape CON requirements, or [74] construction in anticipation of CON.[28] Salkever 2573–75, 2581; Harris 3931, 3934–5. Rather than support a finding that CON has had no negative impact on additional bed capacity, the conclusions are predicated on a barrier to entry that is anticipated to flow from CON regulation. Indeed, our concern lies in the likelihood of *future* entry and expansion in response to a joint exercise of market power by Chattanooga hospitals; such studies shed no light on this issue. Moreover, two of the studies relied upon by HCA focus on the effect of CON regulation on overall hospital investment or costs, and do not examine whether CON laws restrict the growth of hospital bed capacity.[29]

Studies aside, it is important to note that the last three applications for new bed capacity and the only application for a new hospital in the Chattanooga area since 1974 were all denied. CX 890F. While Judge Parker points to several examples of where a CON has been granted for hospital construction (I.D.F. 260; *see* RAB at 40), they either predated CON regulation or were [75] merely replacements for existing hospitals with no increase in bed capacity.[30]

Interestingly, HCA's executive leadership recognizes the barrier to

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[26] *See* P. Joskow, *Controlling Hospital Costs* (1981); Hellinger, *The Effect of Certificate of Need Legislation on Hospital Investment*, 13 Inquiry 187 (1976); Sloan & Steinwald, *Effects of Regulation on Hospital Costs and Input Use*, 23 Journal of Law and Economics 81 (1980); Policy Analysis, Inc., *Evaluation of the Effects of Certificate of Need Programs* (1980).

[27] Salkever & Bice, *The Impact of Certificate of Need Controls on Hospital Investment*, 54 Milbank Memorial Fund Quarterly 185 (1976); Joskow, *The Effects of Competition and Regulation on Hospital Bed Supply and the Reservation Quality of the Hospital*, 11 Bell J. Econ. 421, 440, 446 (1980); *see* Salkever 2318–19, 2554–57, 2560, 2576–77.

[28] *See* Hellinger, *supra* n. 26; Sloan & Steinwald, *supra* n. 26; Policy Analysis, Inc., *supra* n. 26; I.D.F. 268. The one study that arguably does not, the 1981 Joskow study, *supra* n. 26, did not examine effects on bed growth of CON laws. In fact, as noted, a 1980 study by Professor Joskow concluded that CON programs have the effect of restricting hospital bed capacity. Joskow, *The Effects of Competition and Regulation on Hospital Bed Supply and the Reservation Quality of the Hospital*, 11 Bell J. Econ. 421, 440, 446 (1980); *see* Salkever 2319, 2576–77.

[29] Hellinger, *supra* n. 26; P. Joskow, *Controlling Hospital Costs* (1981); *see* Salkever 2578–9; Harris 4163–66. CON laws can limit the growth of bed capacity even if they do not affect overall levels of investment. *See* Salkever 2557, 2567.

[30] Parkridge Hospital opened before the CON laws went into effect in 1973 (*see* I.D.F. 260), development of East Ridge Community Hospital was begun before the CON laws went into effect and was therefore "grandfathered," *see* Tennessee Health Facilities Act of 1973, Pub. Ch. No. 257, §6, 1973 Tenn. Pub. Acts 996, 1003–04 (repealed 1979); CX 890B; RX 1088(2), and Downtown General Hospital, Red Bank Community Hospital, and North Park Hospital were replacements for existing hospitals with no additional beds, thus not adding to the existing capacity in the market. CX 890B, C, E; RX 1088(2), (7). Indeed, both Downtown and Red Bank sought additional beds, which were denied. CX 890B, C; RX 1088(2).

entry quality of CON regulation. In an interview published in a 1981 issue of the *Harvard Business Review,* Dr. Thomas J. Frist, Jr., HCA's president and chief executive officer, observed:

> Federal and state health planning laws have erected formidable barriers to entry into the hospital industry by creating literal monopolies for physicians and hospitals. If the health planning laws state that a community can have only one cardiac surgery program, they might as well give the physician who performs that surgery an exclusive franchise. It's the same for hospitals.

CX 123D; *see also* I.D.F. 258. Dr. Frist also observed that such barriers to entry benefit HCA because they "protect our hospitals from competitors who might build new facilities and take away our market. We know what the market for a particular institution is going to be like 5 or 10 years down the road." CX 123C. He noted further that "regulation severely restricts new hospitals [**76**] from entering our markets." CX 123 F.

In its 1982 Form 10–K, filed with the Securities and Exchange Commission, HCA states that "state certificate of need laws and Public Law 92–603 place limitations on the Company's and its competitors' ability to build new hospitals and to expand existing hospitals. . . ." CX 13S. HCA's 1982 Management Plan for its Mergers and Acquisitions Division observed that "the HSA concept [certificate of need process] continues to preclude or slow down most development of new facilities. . . ." CX 125D. Its 1980 Corporate Strategy Statement noted that CON laws restrict new entry and expansion of existing facilities. CX 221Z–8.

Finally, HCA executives have in the past ascribed a "franchise value" to hospitals as a result of CON regulation. David G. Williamson, Jr., Executive Vice President of Domestic Development for HCA, has referred to the "franchise value" and "franchise type protection" of hospitals that is created by certificate of need regulation. CX 124H, J.[31] The very existence of a "franchise value" is a tacit admission of the [**77**] existence of barriers to entry.

Accordingly, we agree with Dr. Salkever that CON laws pose a very substantial obstacle to both new entry and expansion of bed capacity in the Chattanooga market. *See* Salkever 2321–22, 2325–30. Indeed, the very purpose of the CON laws is to restrict entry. Existing Chattanooga area hospitals appear virtually insulated from new competi-

[31] This franchise value was quantified on one occasion by William G. White, HCA Senior Vice President of Acquisitions, when he attached a value of $8 million, or $20,000 per bed, to the certificates of need for a total of 400 psychiatric hospital beds held by HCC which HCA was seeking to acquire at the time. CX 136; I.D.F. 258. A dollar value for a CON was also designated when HCA offered to purchase the bed complement of Medical Park Hospital—without the land, building or its contents—for about $400,000 in late 1976 or early 1977 so that HCA could add those beds to Parkridge's bed complement. Stern 613; I.D.F. 258. And Jonathan Grimes, administrator of HCA's North Park Hospital, urged HCA to consider acquiring Red Bank Community Hospital in order to acquire the right to operate beds that could be transferred to North Park. CX 420A; I.D.F. 258.

tion in the short term, and have an absolute cost advantage that extends into the long term. Therefore, any harm to competition that could be generated by profitable collusion or interdependent behavior in this market will unlikely be deterred by threatened or actual new entry.

E. *The Nature and Likelihood of Anticompetitive Behavior in the Chattanooga Hospital Market*

1. The Nature of Anticompetitive Behavior

Because HCA denies that anticompetitive behavior among Chattanooga urban area hospitals is likely, it is useful to consider the likely forms that any anticompetitive behavior would take. Profitable collusion could take a number of different forms and restrict price or non-price competition or both.

Some of the most likely forms of collusion between hospitals would involve collective resistance to emerging cost containment pressures from third-party payors and alternative providers. For example, joint refusals to deal with HMOs or PPOs may occur, or perhaps joint refusals to deal on the most favorable terms. Conspiracies to boycott certain insurance companies that are generating price competition may occur. Utilization review [78] programs may be also be resisted. Hospitals could concertedly refuse to provide the information desired by third-party payors—information that would otherwise be provided as hospitals vie to attract the business of those payors and their subscribers. The result of any such boycott would be to raise prices, reduce quality of services or both.[32] [79]

Collusion among Chattanooga hospitals could also inhibit advertis-

[32] Without speculating about the merits of the following cases, we find the allegations instructive with respect to the array of boycotts of particular third-party payors that are possible in this industry. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 603 F.Supp. 1077 (S.D. Ind. 1985) (court notes allegation in countersuit that hospitals conspired to boycott a PPO); *Ohio ex rel. Celebrezze v. Greater Cleveland Hosp. Ass'n*, 1983–2 Trade Cas. (CCH) ¶65,685 (N.D. Ohio 1983) (consent decree), *summarized at* [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 45, at 733 (Nov. 3, 1983) (allegation that trade association organized 90% of area's general hospitals to refuse to deal with non-Blue Cross reimbursers such as health maintenance organizations except at prices higher than Blue Cross rate); *United States v. North Dakota Hosp. Ass'n*, Civ. No. 82–131 (D.N.D. filed Aug. 25, 1983), *complaint summarized at* 4 Trade Reg. Rep. (CCH) ¶ 45,083, at 53,628 (allegation that trade association organized hospitals to refuse to accept contracts of Indian Health Service unless contracts maintained level of charges at rates equal to hospitals' usual private rates); *United States v. Montana Nursing Home Ass'n*, 1982–2 Trade Cas. (CCH) ¶ 64,852 (D. Mont. 1982) (consent decree), *complaint summarized at* 4 Trade Reg. Rep. (CCH) ¶ 45,080, at 53,421 (allegation of conspiracy to raise prices by refusing to enter into Medicaid contracts with state except on Association's terms); *United States v. South Carolina Health Care Ass'n*, 1980–2 Trade Cas. (CCH) ¶ 63,316 (D.S.C. 1980) (consent decree), *complaint summarized at* [July-Dec] Antitrust & Trade Reg. Rep. (BNA) No. 929, at A–10 (Aug. 30, 1979) (allegation of conspiracy to raise rates paid under Medicaid program by jointly negotiating with state); *Maine v. Anesthesia Prof. Ass'n*, No. CV 84–250 (Super. Ct., Kennebec City., consent decree filed June 28, 1984), *summarized at* Trade Reg. Rep. (CCH) No. 658 (July 10, 1984) (allegation of collective refusal to accept Medicare reimbursement as payment in full and collective refusal to participate in Blue Shield program); *Pennsylvania v. Pennsylvania Dental Ass'n*, Civ. No. 81–1187 (M.D. Pa. consent decree filed Sept. 3, 1982), *complaint summarized at* [July–Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1037, at D–1 (Oct. 29, 1981) (allegation of conspiracy to boycott certain third-party payors, particularly Blue Shield); *Texas Dental Association*, 100 F.T.C. 536 (1982) (consent order) (allegation of collective resistance to utilization review).

ing and other forms of marketing of hospital prices and services. Chattanooga hospitals have become more openly competitive in the area of advertising both prices and range and quality of services. *See supra* section V.B. Hospitals could agree, for example, not to advertise or not to advertise in certain media, agreements which may be facilitated by the health care industry's traditional disapproval of advertising. *See* Harris 4052. Patients, their employers and their insurance companies would be substantially harmed by the denial of information useful (and necessary) for choosing among hospitals should advertising or other forms of marketing be restricted. *See American Medical Association,* 94 F.T.C. 701 (1979), *aff'd as modified,* 638 F.2d 443 (2d. Cir. 1980), *aff'd by an equally divided Court,* 455 U.S. 676 (1982); *United States v. Gasoline Retailers Association,* 285 F.2d 688 (7th Cir. 1961) (agreement not to advertise prices except by sign on gas pump found unlawful).

Quality competition itself might also be restricted. For example, the group of hospitals in a relevant market might agree to staff their wards with fewer nurses yet continue to maintain current rates for inpatient services. Patients would be harmed by the resulting drop in quality of services without any compensating reduction in price of services. Colluding hospitals [80] in the market, however, would profit from their agreement by cutting costs without cutting revenues. Again, hospitals could accomplish anticompetitive ends not only by fixing staff-patient ratios but by agreeing on wages or benefits to be paid certain personnel—for example, laboratory technicians. Indeed, wage and salary surveys are common in this market. *E.g.,* Lamb 210. The result would be the same—to hold the cost of inputs down with probable harm to the quality of output of health care services.[33] Hospitals could also agree not to compete for each other's personnel or medical staff. Indeed, some Chattanooga urban area hospital firms have already engaged in such behavior. *See* discussion *infra* section V.E.2 of the Red Bank-HCC agreement.

Moreover, under certificate of need legislation, the addition of new services and purchases of certain kinds of new equipment require a demonstration of need for the expenditure, and the existence of need is determined in part by the facilities already provided in the community. *See supra* section V.D.; I.D.F. 254. It would thus be to the advantage of competing hospitals to enter into agreements among themselves as to which competitor will apply for which service or for which piece of equipment. New bed applications might also be allocated among existing hospitals. The process would be similar to bid-rigging construction contracts—every firm is guaranteed part of the pie at the expense of the customer receiving the best service at the [81]

[33] We also note the harm to hospital personnel that would result from such agreements.

lowest price. In return for agreements not to file competing applications, administrators can support each other's CON applications, thereby assisting the applicant to demonstrate need. *See, e.g.,* CX 96C-D. In fact, there is evidence that Chattanooga area hospitals have recognized the advantage of cooperating on CON matters and that this type of allocation has occurred in Chattanooga. *See* discussion *infra* section V.E.2 of the Red Bank-HCC agreement. Such market division by private agreement would save hospitals the expense of applying for numerous CONs but may harm the quality of care that would be available to patients were CON approval sought independently by each hospital with reference to its own merits and expertise.

Concerted opposition to the CON application of a potential new entrant is yet another manner in which Chattanooga hospitals could successfully collude. Attempts by hospital administrators to garner opposition to threatening CONs are common. *E.g.,* Smith 1981–82; Stern 571, 575; I.D.F. 296; *see supra* section V.D. If the new entrant would inject new price and quality competition into the market, consumers will be harmed when joint opposition is successful (and uncoordinated opposition would not be successful) in barring or stalling the desirable entry.

Anticompetitive pricing behavior could also take several forms. For example, hospitals could work out agreements with respect to pricing formulas. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 170 (2d ed. 1980). Chattanooga hospitals commonly compute percentage increases when raising rates or proposing rate increases to Blue Cross (CX 17Z–[82]77; CX 38Z–96), including different percent increases for different departments of the hospital. *See* CX 18Z–96; CX 32Z–93; CX 315J-L; CX 316D-F; CX 326H. They could thus base collusion upon percent increases in their prices. An example of data hospitals have that could serve as a basis for collusion is provided by one HCA hospital planning document:

> Ancillary increases are budgeted at a 7.7% increase for 1982. This percentage will vary among departments depending on the competitiveness of our current price with others in our area. Each ancillary department gathered price information from area facilities before building a price increase into their revenue budgets.

CX 148Z–75.

Hospitals could also successfully collude with respect to price by agreeing not to give discounts to businesses, insurers and other group purchasers such as HMOs and PPOs. Salkever 2361–62. Moreover, an agreement on the percentage discount to be offered or the group or groups of purchasers to receive a discount can be reached, even without an agreement on the base price to which the discount is applied. *See United States v. United Liquors Corp.,* 149 F.Supp. 609 (W.D.

Tenn. 1956), *aff'd per curiam,* 352 U.S. 991 (1957). Because in the hospital industry customers are grouped into separate insurance plans, collusive arrangements can be established for certain groups of customers. Acute care hospitals can collude as to a specific alternative provider or health insurance company or plan, while competing in their usual fashion with respect to the rest of their buyers. Salkever 2388–89, 2671–75.

In sum, we conclude that hospitals compete in a myriad of [83] ways that could be restricted anticompetitively through collusion.[34] Thus, it appears that a merger analysis in this case need be no different than in any other case; market share and concentration figures, evidence of entry barriers and other market evidence taken together appear to yield as accurate a picture of competitive conditions as they do in other settings. Nevertheless, although HCA concedes that many of the above described forms of collusion *could* occur, the heart of HCA's case is that collusion in this market is inherently unlikely, and to that contention we now turn.

2. The Likelihood of Anticompetitive Behavior

Section 7 of the Clayton Act prohibits acquisitions that may have the effect of substantially lessening competition or tending to create a monopoly. Because Section 7 applies to "incipient" violations, actual anticompetitive effects need not be shown; an acquisition is unlawful if such an effect is reasonably probable. *E.g., Echlin Manufacturing Co.,* No. 9157, slip. op. at 8 (June 28, 1985) [105 F.T.C. 410]; *American Medical International, Inc.,* No. 9158, slip. op. at 17–18 (July 2, 1984) [104 F.T.C. 1].

The small absolute number of competitors in this market, the high concentration and the extremely high entry barriers indicate a market in which anticompetitive behavior is reasonably probable after the acquisitions. The fact that industry members recognize [84] the enormity of entry barriers makes collusion even more probable. In addition, hospital markets have certain features that evidence a likelihood of collusion or other anticompetitive behavior when they become highly concentrated. *See* Salkever 2362, 2382.

First, price elasticity of demand for hospital services is very low (Salkever 2384; Harris 4237–39), which makes anticompetitive behavior extremely profitable and hence attractive. *See* Salkever 2384; R. Posner, *Antitrust Law: An Economic Perspective* 48 (1976). Second, because consumers of hospital services cannot arbitrage or resell them as is often possible with goods, discrimination among different

[34] We by no means intend the above analysis to be an exhaustive list of the ways in which hospitals might behave anticompetitively. We do intend it to be illustrative in view of HCA's claim that successful collusion is highly unlikely in this market.

groups of consumers is possible. That is, collusion may be directed at a certain group or certain groups of consumers, such as a particular insurance company, without the necessity of anticompetitive behavior toward other groups. *See supra* section V.E.1. Third, the traditions of limited price competition and disapproval of advertising (*see* Harris 4052) provide an incentive for future anticompetitive restrictions of those activities. Fourth, and in the same vein, the advent of incentives to resist new cost containment pressures may create a substantial danger of hospital collusion to meet those pressures. Salkever 2393–94, 2705–06. Fifth, the hospital industry has a tradition of cooperative problem solving which makes collusive conduct in the future more likely. Hospitals have historically participated in voluntary health planning in a coordinated manner, and along with other professional organizations, such as medical societies, have [85] participated in developing joint solutions to industry problems. Salkever 2382–84.

Moreover, the history of interaction among Chattanooga hospitals supports a conclusion that anticompetitive behavior, whether through interdependent behavior or express or tacit collusion, is reasonably probable in the highly concentrated market created by these acquisitions. The most convincing evidence of the facility with which such collusion could occur is a blatant market allocation agreement executed in 1981 between Red Bank Community Hospital and HCC. I.D.F. 293–94; CX 96; Smith 1987–88; Stern 588–89. The parties actually *signed a contract* under which Red Bank agreed that for a period of three years it would not "file any application for a Certificate of Need for psychiatric facilities or nursing home facilities." CX 96. Moreover, the parties agreed that they would not compete for each other's personnel and medical staff during that time period, and that they would not oppose each other's CON applications in certain areas. CX 96C-D. Such an overt agreement to refrain from competition at the very least demonstrates the predisposition of some firms in the market to collude when it is in their interest; at worst it shows a callous disregard for the antitrust laws.[35] [86]

The Red Bank-HCC agreement is not the only evidence of the potentially harmful interdependent behavior of Chattanooga hospitals,

[35] HCA argues, however, that the agreement between Red Bank and HCC can only be viewed in the context of the fact that it involved settlement of a dispute; Red Bank agreed to drop its opposition to HCC's efforts to relocate Medical Park Hospital in exchange for HCC's withdrawal of its threat to bring an antitrust suit against Red Bank. HCA therefore contends that the agreement does not show a marketwide predisposition toward collusion. RAB at 26.

We disagree with HCA's assessment and find the Red Bank-HCC agreement very disturbing. We see no reason why such a dispute resolution had to include terms dividing markets. Even if such blatant anticompetitive agreements are uncommon, the fact that a contract like this one was drafted at all shows the predisposition of some Chattanooga market participants to combine to reduce competition. We find nothing redeeming in an agreement to refrain from competing for productive inputs and an agreement not to enter the psychiatric or nursing home facilities market. The fact that HCC and Red Bank (a non-profit hospital, we might add) would settle their dispute so openly in an anticompetitive manner is less than comforting. In fact, we think it is an indication of the haste with which Chattanooga hospital administrators could restrain competition to achieve their goals.

however. Joint opposition to CON applications is often discussed among hospital administrators. I.D.F. 296; *see supra* section V.D. In another example of cooperation, the administrators of Diagnostic, Erlanger, and Parkridge at one time cooperated to present a united front to health planning officials with regard to the need for new beds. CX 238A; I.D.F. 296.

Furthermore, a basis for collusion is provided by the exchanges of rate, salary and other competitively sensitive information that occur in this market. In addition to the rate surveys detailed above, which were chiefly conducted for the purpose of setting the surveyor's prices (*e.g.* Kantanie 1069–70), more casual exchanges of price, wage and other information over the telephone, at social gatherings and, at meetings of hospital administrators commonly take place. *See, e.g.*, Lamb 209, 230–32, 247–49; Stern 564, 577, 638–9; Smith 1958, 1961; CX 239A. For example, Mr. Smith, former administrator of Red Bank [87] hospital, testified that "[t]ypically what will happen is that the manager of radiology at another hospital will call the manager of our radiology department and ask what we are now charging for and list off seven or eight tests and, again, it's through these informal relationships that are out there in the community that this kind of information is generally obtained." Smith 1961. In some instances, rate inquiries have concerned not only current but prospective prices. CX 184G; CX 239A; Kantanie 1134; Lamb 206. Such exchanges of information are evidence of a tendency for collusion in this market. *See, e.g.*, R. Posner, *Antitrust Law: An Economic Perspective* 65–66 (1976).

HCA argues, however, that collusion in this market is too difficult or costly to ever arrange or sustain, or that if not impossible, it poses no substantial likelihood of succeeding. Because collusion is so unlikely, HCA contends, no substantial harm to competition is likely as a result of these mergers.

As a threshold contention, HCA argues that the Chattanooga market is less concentrated than other health care markets that are "vigorously competitive," and that "the fear of a lessening of competition in Chattanooga is plausible only if its market structure is more concentrated than the communities where Complaint Counsel assert competition is active and intensifying." RAB at 18–19. Its chief evidence that such markets are "vigorously competitive," however, is supposed admissions by Complaint Counsel to that effect. *See id.* at 18–19. This is a mischaracterization of the evidence and Complaint Counsel's argument. [88]

The contentions of Complaint Counsel to which HCA refers reflect evidence that competitive forces in the health care industry are on the rise. *See id.* It is true that the undisputed evidence shows that more vigorous competition, including more direct price competition, is

emerging in the health care industry, but it is a fallacy to conclude that growing competition in health care markets means that these acquisitions pose no threat to that competition. In fact, it is just that emerging competition that must be protected from mergers that facilitate the suppression of such competition. *See* Salkever 2393–94. Nothing in the record supports an assertion that highly concentrated hospital markets are performing at [**89**] optimal competitive levels.[36] We therefore reject HCA's assertion.

a. *Non-profit Hospitals and the Likelihood of Collusion*

HCA contends that the most fundamental difference between hospitals in Chattanooga is that several of the hospitals are "non-profit" institutions. Economic theory presumes that businesses in an industry are profit-maximizers and that output will be restricted in pursuit of profits. Non-profit hospitals, the argument goes, have no incentive to maximize profits; rather, they seek to maximize "output" or the number of patients treated. RAB at 23–24. HCA contends that non-profit hospitals may have other goals as well, such as providing the most sophisticated and highest quality care possible, or pursuing religious or governmental goals. RAB at 24; Harris 3860. In short, HCA argues that collusion would not occur because the [**90**] "for-profit" and "non-profit" competitors have no common goal. RAB at 24.[37]

We disagree that non-profit hospitals have no incentive to collude with each other or with proprietary hospitals to achieve anticompetitive ends. First, we note that non-profit status of market participants is no guarantee of competitive behavior. For example, the Supreme Court in the *NCAA* case recently found unlawful anticompetitive conduct, including output restriction, by a combination of non-profit entities. *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 104 S.Ct. 2948 (1984). The Court recognized that non-profit institutions may seek to maximize revenues in order to further their objectives. 104 S.Ct. at 2960 n. 22.

In the words of HCA's own expert, "all hospitals have to worry

[36] Dr. Harris, HCA's expert, testified that the degree of concentration in the Chattanooga MSA is lower than the average for comparable MSAs. HCA concludes from this that "these acquisitions did not make the Chattanooga market structure more concentrated than other hospital markets which complaint counsel argue are vigorously competitive." RAB at 19. As we have stated, complaint counsel do not argue that such markets are vigorously competitive, but only that competition is growing rapidly in hospital markets. Since HCA's argument is expressly dependent upon this mischaracterization of the evidence, its reliance upon Dr. Harris' study must be rejected. Moreover, HCA may not claim that the Chattanooga MSA is an inappropriate "section of the country" in which to measure the effects of these acquisitions and then credibly base its analysis of competitive effects upon a measure of concentration in the Chattanooga MSA.

[37] HCA further argues that a philosophical gulf between the established non-profit hospitals in Chattanooga and the newer proprietary hospitals has created an air of hostility in their dealings that precludes any kind of collusion. RAB at 27. One illustration of this hostility is to be found in efforts made by the non-profit Memorial Hospital to encourage the FTC to challenge these mergers, HCA states. *Id.* We do not find this fact to negate the probability that hospitals would collude if it is in their interest to do so. Competitors may vie for a greater slice of market profits yet cooperate when the size rather than the division of the market pie is at stake. Salkever 2390–91.

about making money, if only because it is a means to other ends." Harris 3861. Indeed, HCA recognizes that non-profit institutions will normally wish to generate some "operating surplus" in order to purchase new equipment or replace old equipment. RAB at 24; *see* Salkever 2389–90. If their net revenue is too low, they will seek ways to increase it. [91] Collusion is one such way and an incentive for collusion to raise prices, restrict output or reduce quality therefore exists. Because all hospitals must earn such "surpluses", their competitive behavior will be similar. *See* Lamb 251; CX 143 at 15; CX 528G. HCA's own documents recognize that nonprofit hospitals resemble proprietary hospitals in the way they do business. CX 527B ("[t]here's no such thing as a non-profit hospital. . . ."); CX 243C; CX 209Z–10.

Dr. Salkever testified that non-profit hospitals "can find attractive ways from their point of view to make use of the monopoly rents which would appear as returns to stockholders in the case of the for-profit hospitals." Salkever 2390. Anticompetitive behavior effecting monopoly rents may permit non-profits to maximize other goals, such as quality of care, amount of unreimbursable care, experimentation, development of highly specialized services, prestige, and so forth. *See* Salkever 2563–67. Our concern under Section 7 is not what economic profits would be used for by the parties exercising market power but simply the fact that such an exercise of market power would be to the detriment of consumers.

In addition, administrators of non-profit hospitals may seek to maximize their personal benefits and comfort through what would otherwise be known as profit-seeking activity. For instance, though doubling an administrator's salary may not legally constitute the accumulation of "profit" for a non-profit hospital, it will be necessary to take that money from revenue net of other costs. Any action that is "profit-maximizing" would [92] increase the pool of funds from which such distributions could be made. Likewise, maximizing profits would be consistent with obtaining nicely furnished offices, lavish business trips and so forth. *See* Salkever 2563–65.

Finally, even assuming that the goals of non-profits sometimes depart from pure profit maximization, often those goals are sufficiently divergent from the ends of competition to make anticompetitive collusion desirable. There is no guarantee that non-profit hospitals seek competitive levels of price, quality and output for their customers. For example, as Judge Parker found, because there is such great public pressure to reduce hospital costs, it would be to the mutual advantage of both for-profit and non-profit hospitals collectively to resist such pressures any time their goals are inconsistent with cost containment. *See* I.D. at 88. HCA itself contends that government efforts at cost containment have come about because of the unique incentives

in the hospital industry to maximize quality of treatment. RAB at 44–46. To the extent that hospitals are quality maximizers that desire to experiment, obtain the best equipment possible and so forth, efficient reductions in spending for hospital services, effected through the efforts of public or private third-party payors or otherwise, could hurt those goals. Non-profit hospitals thus have an incentive to collude if by doing so they can resist such pressures.

Collective resistance to third-party payors' utilization review programs and efforts to obtain detailed cost and quality [93] data from hospitals to use in "comparison shopping", for example, would constitute anticompetitive behavior beneficial to non-profit hospitals and harmful to insurance companies and their subscribers. *See supra* section V.E.1. With such information available, competing hospitals may be made to charge lower prices at an output level and mix that purchasers desire. Detailed hospital-specific cost and quality data can be used to seek out the best quality health care services for the dollar among competing hospitals. Both non-profit and for-profit hospitals, however, have an incentive to resist the provision of such information, since it is inconsistent both with profit (or "surplus") maximization and with continued control over output for "quality" or other reasons. Even non-profit hospitals will not want to lose their control over competitive variables, such as the flow of information, that could change their preferred output mix.

Any cooperative resistance to such pressures, however, is inconsistent with the requirements of competition, even if the goal of the non-profit hospitals is couched in terms of "maximizing output" or "maximizing quality." If hospitals have a definition of output maximization or quality maximization that is different from the competitive levels of output and quality, then any concerted action is furtherance of their goals will be anticompetitive. In short, any behavior which deviates from competition is harmful to consumers, whether the motives are profit-maximization or maximization of some other market variable.[38] [94]

Moreover, specific characteristics of non-profit hospitals in this market make anticompetitive behavior a reasonable probability. First, two of the six non-profit hospitals in the Chattanooga urban area, Downtown General and Red Bank, are managed by HCA. *See supra* section V.A. Indeed, the non-profit hospitals in the Chattanooga

[38] For example, HCA relies upon the testimony of Mr. Furrey, the senior lay administrator of Memorial Hospital, which supposedly "demonstrates" the commitment of Memorial to providing hospital care at the lowest possible price. RAB at 24; Furrey 1525. Such a motivation would not necessarily keep prices at a competitive level but only at the level that Mr. Furrey believes is the "lowest possible" within the constraints of the variables he seeks to maximize. If those constraints are not market demand constraints, then his well-intentioned motivation will not serve the ends of competition. And to the extent those constraints diverge from competition, incentives to collude to reach those anticompetitive ends are present. Often a price above a competitive level, therefore, will be in the interests of both for-profit and non-profit hospitals.

area managed by HCA are considered to be proprietary hospitals by their competitors and others in the industry. Lamb 249–51; Smith 1951–52; Blank 2067–68.

Second, two major non-profit hospitals, Erlanger and Tri-County, have a tremendous incentive to participate in price collusion. Erlanger has sole responsibility for unreimbursed indigent care in Hamilton County. Lamb 115. More than 100 of Erlanger's beds are generally in use at all times for indigent care. *Id.* at 114–115. Because it must subsidize unreimbursed care out of the rates charged to paying customers, Erlanger cannot compete effectively through price cutting. Lamb 176–77. Erlanger's rates are 50 dollars per day *or 10%* higher than they would be if such cross-subsidization between paying and non-[95]paying patients were not necessary. Lamb 113–14. Because it cannot price below a level that covers the direct costs it incurs for indigent care, Erlanger would in fact benefit from a decrease in price competition through interdependent behavior. Salkever 2370–72. The same analysis applies to Tri-County, which must provide care for indigent residents of Walker, Dade and Catoosa counties in Georgia, and shift costs from non-paying to paying patients. CX 118D. Because Erlanger and Tri-County would be hurt by price competition through such methods as large discounts to third-party payors, they have every incentive to join in a collusive scheme that diminishes price competition.

In addition, because of their inability to markedly cut prices, it may even be that successful anticompetitive collusion could be carried out by HCA hospitals and the two other proprietary hospital firms in the market without the participation of the independent non-profit hospitals. If HCA could convince the other proprietary hospitals in the market, Metropolitan and East Ridge, to agree to an anticompetitive scheme respecting prices, Erlanger and Tri-County would not have the ability to undercut it as long as the price was set below their price floors created by the cross-subsidy between paying patients and indigents. *See* Salkever 2370–72. And again, they would have little *incentive* to discourage collusion that raised prices up to that price floor, since market prices below that level could draw business away from them.

In the event of such collusion, Memorial and the tiny, low quality Wildwood are left as the only non-profit hospitals not [96] managed by HCA to defeat the collusive scheme. It appears unlikely in the face of the expense and difficulty of obtaining a certificate of need for expansion of bed capacity that these two hospitals themselves could provide enough beds to successfully deter harmful collusion. *See* discussion *supra* section V.D. To expand capacity the hospitals would have to believe they could garner enough revenue to justify the cost

of seeking a CON—and do so in face of the opposition of HCA and the other colluders.

Finally, non-profit status has not precluded hospitals in this market from engaging in anticompetitive behavior or from exchanging sensitive competitive information with other hospitals. *See, e.g.,* Lamb 206–11. For example, the Red Bank Board of Directors itself agreed to the market allocation scheme with HCC discussed above. *See supra* this section.

In sum, we conclude that non-profit hospitals often have incentives to act as profit-maximizers in an effort to further goals that can only be realized by increasing net revenues. We also find that even when the goals of non-profit hospitals diverge from profit-maximization, the evidence shows that they are not necessarily commensurate with the ends of competition that Section 7 is intended to protect. Divergent maximands between competitors can often produce the same anticompetitive ends. And lastly, the evidence shows that non-profits in this market have an incentive to collude and have engaged in cooperative behavior with other hospitals. **[97]**

b. *Purported Obstacles to Successful Coordination*

Relying entirely upon the testimony of its expert, Dr. Harris, HCA argues that even if hospitals in Chattanooga were inclined to collude, the administrators of those hospitals would find it difficult to reach anticompetitive agreements or understandings, or to sustain them if they ever were reached. This is so because the ideal market circumstances for collusion are not present, *i.e.* where manufacturers are selling "some simple, relatively homogeneous good, well characterized by a single price." Harris 3865–66. HCA contends that hospital services are heterogeneous and influenced by a variety of complicating factors. Hospitals provide a large number of varied medical tests and treatments and each patient receives unpredictable personalized service the extent of which is determined by physicians. RAB at 30. Moreover, HCA claims, costs and demand vary between hospitals. And because the dominant avenues of competition relate to the quality of medical care and patient amenities, hospitals would have to agree on a whole host of things to eliminate competition in a manner sufficient to earn monopoly returns, it is alleged.

HCA argues that "[a]ny attempts to reach explicit understandings would require a long agenda, and any hypothetical agreements would have to be lengthy and complicated (this hospital may buy such and such equipment, but no more, unless such and such happens, while that hospital may purchase the same or some other equipment, and so forth for all market participants; such and such inducements may be offered to **[98]** physicians, but no others; and so forth and so on)."

RAB at 32. Similarly, HCA concludes with respect to restriction of price competition: "To achieve any price uniformity or pattern with regard to the ultimate variable of interest—the total cost of a hospital stay—hospital administrators would have to find some way to bring [individual service prices] under collusive control. Among other obstacles, hospital administrators would have to find some way to force or induce physicians to treat and test all patients similarly situated (however that might be defined) in the same way. . . ." RAB at 35 n.28.

HCA's analysis of the likelihood of collusion distorts competitive reality. HCA would have us believe that the world of possible collusion is limited to complicated formulae concerning every aspect of hospital competition—that market power can only be exercised with respect to the entire cluster of services that constitutes the acute care hospital market through a conspiracy fixing the overall quantity or quality of treatment running to each patient in the market. Rather than focus on the likely avenues of collusion among hospitals, HCA assumes into existence a world in which collusion is infeasible.

We reject this analysis. Neither Dr. Harris nor HCA in its briefs offer any explanation whatsoever for why hospitals would have to fix every aspect of competition between them to collude profitably.[39] We see no reason why hospitals would have more [**99**] difficulty reaching an understanding with respect to many of the different aspects of acute care hospital competition described above than competitors would in any other market that is equally concentrated. *See* Salkever 2789, 2795–97. For example, boycotts of third-party payors or agreements not to advertise do not depend upon complex formulae.

The flaw in Respondent's analysis, and perhaps the reason why we are asked to simply assume that hospitals would have to collude on all fronts to reap any benefits, is that profits gained from colluding with respect to fewer than all the dimensions of hospital competition will unlikely be eradicated even by continued competition in other areas. Once hospitals have deviated through collusion from the competitive actions they would pursue independently, even increased competition in other areas would not provide a price-quality mix desired by patients, physicians and third-party payors. There are as a result diminishing returns to investing monopoly rents in other areas. For example, hospitals may fix a percentage price increase for services of their radiology departments. They could try to attract patients by taking that money and improving patient accommodations. But a patient needs only one television and one telephone, and the value of potted plants in the window may diminish greatly as

[39] Indeed, Dr. Harris seemed to have read everything relating to health care except the record in this case. So much of his expert testimony was flatly contradicted by other credible evidence that we have discounted his testimony accordingly.

more are added. The point is that the value to hospitals of increased competition on dimensions other than those anticompetitively altered will dissipate greatly before all [**100**] or even many of the monopoly profits garnered from collusion are used up. Because it is profitable, the incentive to collude remains. *See* G. Stigler, *Price and Nonprice Competition,* in *The Organization of Industry* 23 (1968).

In fact, case law demonstrates that anticompetitive collusion with respect to only certain variables in the overall competitive landscape can and has occurred even when competition remains with respect to other variables. *E.g., Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980) (agreement on credit terms); *United States v. Gasoline Retailers Association,* 285 F.2d 688 (7th Cir. 1961) (advertising agreement). In the health care field, the Commission has likewise found unlawful agreements restricting only some areas of competition—advertising and certain contractual practices. *American Medical Association,* 94 F.T.C. 701 (1979), *aff'd as modified,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 455 U.S. 676 (1982); *Michigan State Medical Society,* 101 F.T.C. 191 (1983). It is thus clear that agreements as to all aspects of competition are not necessary for effective collusion to take place and to have a negative impact on competition. *See* Salkever 2789, 2795–97.

Moreover, the high barriers to entry and expansion into this market make it even less likely that monopoly rents would be competed away. The addition of expensive new equipment requires a CON in this market, making it more difficult to invest monopoly rents in their purchase. *See supra* section IV.D. The barriers to adding new bed capacity are even greater. If a hospital cannot add beds to accommodate new patients, the importance of [**101**] all the other ways in which it could possibly compete away monopoly rents are greatly reduced.

HCA offers an additional reason why the acquisitions allegedly create no risk that Chattanooga hospitals will collude to eliminate price competition, arguing that price collusion is unlikely because of the role of Blue Cross in this market. RAB at 35. All hospitals in the Chattanooga urban area participate in the Blue Cross program and agree to charge Blue Cross subscribers only those rates approved in advance by Blue Cross. Blue Cross in its rate review could detect and deter any concerted request for rate increases, HCA argues, because Blue Cross reviews rates of Chattanooga hospitals with reference to those of other hospitals in the state. If hospitals in a local area such as Chattanooga attempted to raise rates collusively, the argument goes, Blue Cross would immediately discover that and, with its commanding market position, reject the inflated rates. RAB at 36.

We cannot accept HCA's claims that Blue Cross has both the omniscience and market power to halt successful collusion by Chattanooga

hospitals. First, under the current Blue Cross charge approval system, collusion could be difficult to detect. *See* Salkever 2387. If all the hospital firms in Chattanooga attempt to raise prices a similar amount in the review process, coordinated pricing could be overlooked; there is no *a priori* reason why Blue Cross would consider this to be the result of collusion rather than a rise in costs. The evidence is clear that Blue Cross looks at no single factor in determining whether [102] or not to approve a hospital's rate increase. Long 1309. Among the myriad of factors it does consider, Blue Cross often looks to the charges of other local hospitals in assessing a rate increase proposal as well as sometimes looking to other comparable hospitals in the state. *Id.* Indeed, hospitals in the Chattanooga area have offered the rates of other local hospitals to Blue Cross as justification for rate increase proposals. *E.g.*, Smith 1965–66. We think that uniform or similar rates of increase among Chattanooga hospitals would therefore likely be approved as reasonable, and certainly reject as unsupported by the evidence HCA's contention that the state-wide comparisions Blue Cross sometimes makes are dispositive here. Salkever 2387.[40]

Furthermore, even if detected, we do not think such collusion could be easily deterred by Blue Cross. HCA ignores the fact that Blue Cross has a contract not only with participating hospitals but also with its subscribers. Blue Cross must serve its subscribers in the Chattanooga area, and HCA does not explain how Blue Cross could reject a concerted effort by the hospitals there even if it wanted to; certainly, Blue Cross could not ask its subscribers to all go to Knoxville for [103] hospital care if Chattanooga urban area hospitals colluded. We find HCA's failure to even address this reality fatal to its arguments. In fact, Blue Cross depends upon competition among hospitals to ensure that subscribers' incentives to utilize participating hospitals force individual hospitals to enter into participation agreements with reasonable price terms. *See* Long 1291–92. A threat of departicipation in the Blue Cross plan by a group of Chattanooga hospitals could be enough to pressure Blue Cross into approving higher prices. Salkever 2388–89.[41]

Even if Blue Cross were to deter an exercise of market power directed at it, collusion could be aimed at other groups of patients. The Blue Cross contract does not restrict participating hospitals' charges to non-Blue Cross patients and their third-party payors. Long 1319–20.

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[40] Indeed, one of HCA's arguments elsewhere is that rate surveys of area hospitals are used to persuade Blue Cross of the reasonableness of a hospital's charges. RAB at 28 n.21. We therefore find its argument that Blue Cross will only consider the reasonableness of charges across a statewide area erroneous. In fact, we believe that such surveys could facilitate collusion with respect to Blue Cross by providing the basis for persuading Blue Cross of the reasonableness of each hospital's supposedly independent request.

[41] Dr. Salkever testified that in a similar situation in Philadelphia, a Blue Cross plan was forced into lengthy negotiations with area hospitals and was not in a position to hold firm. Salkever 2389.

In fact, some Chattanooga hospitals have maintained different sets of prices for Blue Cross subscribers and for other patients. *E.g.*, Long 1320, 1356; Petruzzi 732; Kantanie 1074, 1138, 1141–42.

Finally, HCA argues that any hypothetical agreements or tacit understandings, even if reached, would be unlikely to endure in this market because of the impossibility of monitoring and policing such arrangements and the destabilizing effects of asserted external events that continually buffet the market. For example, there is no opportunity among hospitals to detect cheating from a pricing agreement, since information about [**104**] hospital prices is unavailable through posting or advertising, HCA contends. RAB at 37.

We disagree with the conclusion that anticompetitive agreements could not endure because of the difficulty of policing and enforcing such agreements. Cheating with respect to prices would likely be detected through negotiations with third-party payors. For example, if a united front were not presented, Blue Cross would likely use the lower price increases offered by cheating hospitals as leverage during negotiations. Long 1309. Moreover, a third-party payor like Blue Cross could not refuse to deal with all the hospitals in Chattanooga; any simple refusal to deal with a non-cheating hospital would indicate a payor had extracted its desired price elsewhere.

Rate surveys are another potential tool to detect cheating. Surveys are now used to discover rates for purposes of comparison, despite HCA's argument to the contrary, and we see no reason why they could not be targeted at items upon which hospitals attempt to collude. Deviations from agreements on price increase formulas could be detected in this manner.

Certainly, cheating on agreements to boycott certain parties or not to advertise would be quickly detected. For example, if hospitals decided to boycott a particular HMO, cheating would be obvious if the HMO successfully began operation. Any agreements to allocate new equipment purchases that require a CON could be monitored through the public CON process. Likewise, an agreement not to advertise would be easily detected by observing the media. In short, we see no reason why detection of cheating [**105**] would be significantly more difficult in this than in any service industry.

HCA also argues that hospital care is undergoing rapid technological change that makes any collusion unlikely to endure. Such rapid change in the variety and sophistication of treatment of diseases would require constant revision of any hypothetical understandings among hospitals, which would be particularly difficult because different hospitals would view the opportunities posed by new technology differently, argues HCA. RAB at 38.

Technological change in the hospital industry is not of the type that

would undermine most of the likely anticompetitive agreements discussed above. For instance, the desire for new equipment would not undermine an agreement to increase prices on the daily charge for rooms. Nor would it impact an agreement to refrain from advertising in certain media. HCA offers no explanation for how such simple agreements or group boycotts would be undermined by changes in technology respecting other aspects of hospital competition, except to make the unsupported assertion that collusion with respect to all elements of competition is necessary.

Moreover, the certificate of need process makes an anticompetitive allocation of technological improvements possible by restricting the allocation of certain expensive new equipment. If only one hospital will be allowed to obtain the new equipment anyway, an incentive for "bid-rigging" exists so that different hospitals are assured of getting at least some of [**106**] those improvements at a minimum of effort and expense. *See supra* section V.E.1. Once the certificate of need is granted, cheating is much more difficult, and cheating during the CON process would be easily detected because opposition is public. In any case, there are many aspects of competition among hospitals that are not subject to such technological innovation yet are of significant competitive concern.

In sum, we reject HCA's argument that the increased concentration in the Chattanooga hospital market caused by these acquisitions does not increase the likelihood of successful anticompetitive behavior among Chattanooga hospitals. Rather, based on our review of all the evidence, we find a reasonable probability of anticompetitive behavior in this market as a result of these acquisitions.

F. *Conclusion*

We conclude that the effect of the acquisitions in question may be substantially to lessen competition in the Chattanooga urban area general acute care hospital market. The acquisitions have increased concentration substantially in an already concentrated market. The market is no less prone to many forms of collusion than markets in other industries, and perhaps more prone to some types of collusion. Moreover, the market is characterized by extremely high barriers to entry, virtually eliminating any threat to the successful joint exercise of market [**107**] power by incumbent Chattanooga hospitals. Respondent urges two "defenses" on its behalf, to which we now turn our attention.

VI. DEFENSES

A. *The Uniqueness of the Health Care Industry*

Respondent briefly argues that the regulatory environment imposed by Congress in the health planning laws of the 1970s evidences that the health care industry is unresponsive to "classic marketplace forces," and draws two conclusions therefrom. RAB at 44–47. First, HCA claims that these acquisitions are impliedly immune from Section 7 scrutiny. We recently faced precisely this issue with respect to a hospital acquisition in the *AMI* case and rejected respondent's claim of implied immunity. *American Medical International, Inc.*, No. 9158, slip. op. at 12–17 (July 2, 1984)[104 F.T.C. 1]. HCA, in the few pages it devotes to implied repeal, points to no facts that would indicate "specific prompting" of these acquisitions by operation of a mechanism established under the health planning laws. *Id.* at 16. The acquisitions therefore cannot even be considered eligible for implied immunity from the antitrust laws. *Id.* at 15–17. We thus reject HCA's defense for the same reasons we rejected respondent's assertion of implied immunity in *AMI*. *Id.* at 12–17. [108]

Second, HCA concludes that to the extent Section 7 is applicable, "the frequency and force with which Congress has recognized the distinctive characteristics of health care markets simply mandates that these acquisitions be judged on the basis of a careful and thorough 'examination of the particular market—its structure, history and probable future. . . .' " RAB at 47, *quoting United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974). We have completed such an analysis above.

B. *Efficiencies*

HCA argues that there are "vertical" benefits from these acquisitions of "quality management, sophisticated support services and access to capital." RAB at 54. HCA concedes that any efficiencies resulting from the horizontal integration of Parkridge Hospital and the acquired hospitals were modest at best. RAB at 54 & n.51. Its efficiencies argument is offered merely to tip any balance in its favor; indeed, HCA makes no attempt at quantifying these alleged benefits. Its brief states: "HCA does not ask the Commission to hold that the benefits of these acquisitions outweigh a lessening of competition. HCA's position is rather that Complaint Counsel have presented no persuasive evidence that a lessening of competition is likely, and that particularly in light of the benefits associated with these acquisitions, airy speculations of conceivable competitive harm should not suffice to strike down these acquisitions as violating section 7 of the Clayton Act." RAB at 28. [109]

For the reasons set forth above, we find the evidence convincing that a lessening of competition is substantially likely in this market as a result of these acquisitions. We must therefore reject HCA's argument on its own terms; there is no "balance" to tip in HCA's favor. We note in addition that HCA has provided no more than speculation as its "evidence" of efficiencies. Certainly, HCA has not met the standards for asserting an efficiencies *defense* set forth in *AMI,* which requires "substantial evidence" of efficiencies. Slip. op. at 51–53. Moreover, HCA offers no reason to believe that any efficiencies resulting from association with a hospital chain were not already substantially realized by association with HAI and HCC, the acquired hospital chains. We therefore reject HCA's case for efficiencies flowing from these acquisitions.

VII. CONCLUSION

We hold that HCA's acquisitions of HAI and HCC may substantially lessen competition in the Chattanooga urban area acute care hospital market in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The only remaining issue is the appropriate remedy to be accorded the public in this case. **[110]**

VIII. REMEDY

The appropriate remedy in this case is yet another hotly contested issue. Because we find that HCA violated section 7 of the Clayton Act first in purchasing HAI and second in purchasing HCC, we order the divestiture of hospitals purchased—Diagnostic Center Hospital and North Park Hospital—and their adjacent facilities. We also order the divestiture of the Downtown General management contract acquired by HCA from HAI, since it is integral to the HAI acquisition and its likely pernicious effect on competition. *See supra* section V.A.[42]

The dispute between the parties revolves around the appropriateness of prior approval and prior notification remedies. HCA maintains that neither is appropriate, particularly a prior approval requirement, and that a prior notification requirement in any case should not go beyond that imposed in *AMI.* Complaint Counsel offer a prior approval remedy that allegedly satisfies the requirements set forth in *AMI,* and in addition advocate a prior notification remedy, which goes somewhat beyond that imposed in *AMI,* for acquisitions not covered by the prior approval provisions.

The Commission of course has the authority to impose prior approval requirements. *See, e.g., AMI,* slip. op. at 57. We rejected a broad prior approval requirement in *AMI* for two [111] separate but sup-

[42] HCA no longer manages Red Bank Community Hospital, and no divestiture order is required. *See supra* section V.A.

porting reasons. First, it is industry market structure and market conditions, not whether a "knowing and deliberate violation" or a "likelihood of repeated unlawful conduct" has been shown, that determine the appropriateness of imposing a prior approval requirement in a Section 7 case. *Id.* at 57–59.[43]

Secondly, we found "that AMI's presence in the hospital market as a potential purchaser of local hospitals that are put up for sale has a substantial potential procompetitive impact, and that the proposed prior approval requirement will uniquely debilitate or perhaps entirely eliminate *AMI* as a competitor in this market." *Id.* at 60. We concluded that "time is of the essence in negotiations for the purchase of local hospitals, and that the ability to make a purchase commitment with some degree of certainty of obtaining the necessary regulatory approvals is an important element in this negotiating process." *Id.* Complaint Counsel propose an asserted "narrowly focused" prior approval provision to satisfy our concerns in *AMI.* It would **[112]** require HCA for a period of ten years to obtain prior Commission approval before acquiring a hospital which is: 1) within the relevant geographic market; or 2) within an area in which the HHI would be greater than 1800 after the acquisition, if the acquisition would raise the HHI by more than 100 points and a certificate of need is required by state law for a new acute care hospital to begin operation.

We agree with Complaint Counsel that a prior approval requirement for future HCA hospital purchases and assumption of hospital management contracts in the Chattanooga urban area is appropriate here. The record evidence shows that any horizontal acquisition or assumption of a management arrangement by HCA in the Chattanooga urban area, like those in this proceeding, poses such a potential for harm to competition that prior Commission approval is warranted. A Commission approval requirement does not amount to a ban on acquisitions; but in view of the substantial danger of competitive harm in the Chattanooga urban area we think it is the most efficient way to screen out those mergers and management contracts that are potentially anticompetitive. Moreover, we do not believe that imposing a prior approval requirement in one local market, the Chattanooga urban area, will substantially harm HCA's competitive position in the market for hospital acquisitions as a whole.[44] **[113]**

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[43] We concluded in *AMI:* "Although the record evidence clearly indicates that the hospital industry is undergoing a move towards increased consolidation, on the basis of this evidence we are unable to assess the effects of those changes on competitive conditions within the multitude of local and regional geographic markets that may exist for hospital services. Our reading of the record does not indicate any basis for defining the parameters of these markets, determining concentration levels or changes in concentration levels in these markets as a result of the acquisitions that are taking place in this industry, or assessing whether the acquisitions have had either the effect of entrenching monopolists or increasing competition between market participants." *Id.* at 59.

[44] We did not consider prior approval solely within the relevant geographic market in *AMI* because the issue was never properly before us. *See American Medical International, Inc.*, No. 9158, slip. op. at 9–10 (Nov. 9, 1984) (Order and Opinion of the Commission Granting in Part and Denying in Part Complaint Counsel's Petition for Reconsideration). [104 F.T.C. 617]

However, we cannot agree that the evidence in this case justifies imposing a prior approval requirement for areas outside the Chattanooga urban area. Complaint Counsel's proposal has some appeal since prior approval would be triggered only in highly concentrated markets with applicable CON laws presumably restricting entry. Nevertheless, the evidence does not establish that all hospital markets can be judged by Complaint Counsel's three criteria to be so manifestly anticompetitive as to warrant a prior approval remedy. There was some evidence offered with respect to other hospital markets in support of the various arguments made in this case, but it is insufficient to allow us "to assess the effect . . . on competitive conditions within the multitude of local and regional geographic markets that may exist for hospital services." *AMI,* slip op. at 59. For example, the nature of regulation can vary markedly from state to state. *See, e.g.,* Harris 3861, 3885–86. We note that while some markets are subject to price controls, the Tennessee market at issue in this case is not subject to price regulation. *See id.; AMI,* slip op. at 29.

Competitive environments can thus differ substantially between different local markets. As a result, we cannot conclude that mergers outside the Chattanooga urban area that meet complaint counsel's criteria are so inherently anticompetitive that they should be subject to preclusion without an adjudication. Moreover, we believe as in *AMI* that such a [114] nationwide prior approval requirement would severely handicap HCA in the highly competitive market for hospital acquisitions in such areas.

It may be that in an industry with numerous, very local output markets such as hospital care, the evidence in a case such as this will rarely justify nationwide prior approval. However, we by no means foreclose the opportunity for Complaint Counsel to seek prior approval outside the relevant geographic market where evidence sufficient to justify such a broad remedy is available. Sufficient evidence relating to other local markets was not presented in this case.

By declining to impose a nationwide prior approval remedy on HCA, however, we do not imply that HCA's future acquisitions are of no competitive concern. We do believe that a prior notification requirement is necessary and appropriate and not unduly burdensome under the facts of this case, and reject HCA's argument to the contrary. Legitimate concerns about HCA's future acquisitions can be satisfied by requiring HCA to notify the Commission of its intention to make acquisitions that may pose competitive concern. This enables the Commission to investigate and bring an enforcement action if necessary, while at the same time preserving the procompetitive benefits attributable to HCA's presence in the acquisition market. *AMI,* slip op. at 60.

HCA argues that a prior notification requirement is a "punitive" remedy justified only when a violation is "flagrant or egregious" or when a party has proceeded in "bad faith" or with a [115] "willingness to flout the law." RAB at 57–58. In addition, HCA contends, the Hart-Scott-Rodino Act ("HSR") already provides for prior notification to federal authorities of important mergers, and therefore it is both unnecessary and unlawful to require more than HSR demands. RAB at 57–59. We reject these arguments. As noted above, a prior notification provision allows the Commission to examine mergers which may be of substantial competitive concern without imposing the burden on Respondent that a prior approval remedy would.

Moreover, HSR does not assure the Commission adequate opportunity for monitoring because many HCA hospital acquisitions are exempt from its reporting requirements. For example, purchase transactions involving less than 15 million dollars are exempt. 16 C.F.R. 801.1(h), 802.20(a) (1984). In local markets, such acquisitions could be manifestly anticompetitive; AMI's acquisition of French Hospital was almost a merger to monopoly yet the total cost of the transaction was less than 11 million dollars. *American Medical International, Inc.*, No. 9158, slip. op. at 8 (Initial Decision, July 27, 1983) [104 F.T.C. 1]. Such acquisitions are common for HCA. *See, e.g.*, 117Z–105; CX 125E. Other types of exempt hospital acquisitions in which HCA is also interested, and which are particularly likely in hospital markets, include purchase acquisitions from governmental entities, (15 U.S.C. 18a(c)(4) (1982); *e.g.*, CX 418E; CX 423; Williamson 3265), and acquisitions through leases and management contracts. 15 U.S.C. 18a(a)(3) (1982); 16 C.F.R. 801.1(c)(1), 801.2 (1984); *see, e.g., supra* section V.A. [116] We think a prior notification requirement for acquisitions not covered by HSR is therefore appropriate.

HCA's argument further misstates the standard for imposing prior notification relief. Whether such relief is appropriate depends not on whether the respondent has a history of law violations or otherwise deserves to be punished, but on whether, in view of the violation proven in this case, the relief is necessary to detect and investigate future acquisitions that may significantly endanger competition. *See AMI*, slip. op. at 60; *American Medical International, Inc.*, No. 9158, slip. op. at 18 (Nov. 9, 1984) (Order and Opinion of the Commission Granting in Part and Denying in Part Complaint Counsel's Petition for Reconsideration) ("*AMI* Rehearing") [104 F.T.C. 617]. In any case, the Commission clearly has the authority to impose prior notification relief, and in view of the much lighter burden imposed by such reporting than by a prior approval requirement, we think it appropriate to do so here. *See AMI* Rehearing at 13–17.

Finally, we see no reason to go beyond the prior notification relief

granted in *AMI*. Our reasons for not imposing waiting periods are set forth well in the consideration of the petition for reconsideration in that case, and will not be discussed at length here. *See id.* at 17–18. Suffice it to say that imposing an inflexible waiting period on HCA would subject covered acquisitions to a time constraint that would accomplish little other than disabling HCA vis-a-vis its competitors. *Id.* at 17. A requirement that HCA notify the Commission of an [117] acquisition, lease or management contract when it becomes legally bound to the arrangement should provide sufficient time for Commission staff to review the acquisition or contract. Nor do we find sufficient reason to go beyond the threshold requirements for reporting set forth in *AMI*. We will therefore conform the prior notice portion of the order in this case to that imposed in *AMI*.

STATEMENT OF COMMISSIONER PATRICIA P. BAILEY
CONCURRING IN PART AND DISSENTING IN PART

As in last year's decision in *American Medical International,*[1] I agree with the Commission majority on product and geographic market definitions, and the finding of liability. Also as in *AMI,* I must dissent from a remedy which stops short of requiring prior approval for a certain limited class of future mergers, imposing instead an almost purely symbolic duty of prior notification.

Indeed, this dissent is so completely parallel in substance to my concerns in *AMI* that I will not repeat them here. There is, however, one important difference between the two cases which requires further discussion. In *AMI* it seemed at least possible that the Commission's standards for prior approval could produce a prior approval order in some future case. Unfortunately, it is now abundantly clear that the *AMI* test, as interpreted in *HCA,* is a mirage, at least as to prior approval which extends beyond the geographic market at issue in the litigation. [2]

Consider: here, as in *AMI,* we have a company with an aggressive corporate policy of growth through acquisition[2] which engendered a series of takeovers in a local market characterized by high concentration and high entry barriers. We have every reason to suppose that HCA will carry out its policy in similarly situated markets in the future.[3] We also know that many of these mergers, no matter what their actual impact on a local market, may be priced at a level which does not trigger Hart-Scott-Rodino reporting requirements; conse-

[1] *American Medical International, Inc.,* Docket No. 9158 (July 2, 1984) ("AMI"). [104 F.T.C. 1]

[2] *See, e.g.,* CX 110Z–28; CX 117–J, Z–103, Z–114; Williamson Tr. 3256.

[3] In Appendix C to their appeal brief Complaint Counsel list twenty markets where HCA owns, leases or operates hospitals. The HHI's for these markets range from 1698 to 3246; four-firm concentration ratios range from 75.3% to 98.6%; HCA's current market share ranges from 3.7% to 45.4%.

quently the Commission cannot call upon that Act's provisions to forestall the merger until adequate information for antitrust analysis is received.

In these circumstances, "fencing-in" seems appropriate. The Commission should want to evaluate *and be able to block* future HCA mergers which could adversely affect a vulnerable market. The *AMI* opinion seemed to say that, if a screen could be devised which would filter out safe markets, a prior approval order would [3] be acceptable.[4] In my opinion, Complaint Counsel have produced such an order. They do not ask for a prior approval clause which blankets the nation, or even specific regions. Instead, prior approval would be required for an HCA hospital acquisition outside the Chattanooga area *only* if:

(1) HCA is already operating a hospital in the market or would end up operating two or more hospitals as a result of two or more simultaneous acquisitions from different persons;

(2) the acquisition would result in a Herfindahl Index in a local hospital market of over 1800;

(3) the acquisition would increase the Herfindahl Index by 100 or more points; and

(4) barriers to entry are likely to be high due to state certificate of need laws (which require government approval for new entry into the market) (Complaint Counsel's Appeal Brief at 39 and Appendix A) [4]

These standards parallel those of the Department of Justice Merger Guidelines. It might be argued that this test presents two practical difficulties for respondent: how to tell which is a local market, and how to get "sales" data from which to calculate the Herfindahl Index; but Complaint Counsel have anticipated these queries. Their proposed order specifies that market shares be calculated upon state-licensed acute care bed capacity, which is public information, and that the market be deemed to be the Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA"), likewise public knowledge. These geographic and product market surrogates are used *only* to determine the necessity of filing with the Commission; they need not be used in the substantive evaluation of the merger. To my mind this is an order which is sensitive to respondent's reporting burdens and yet serves the Commission's enforcement needs.

Nevertheless, the Commission rejects this approach, showing that all along the true parameters of the *AMI* test were contained in the

[4] In *AMI* the majority rejected fencing-in with the following language:

> Our reading of the record does not indicate any basis for defining the parameters of these markets, determining concentration levels or changes in concentration levels in these markets as a result of the acquisitions that are taking place in this industry, or assessing whether the acquisitions have had either the effect of entrenching monopolists or increasing competition between market participants. Slip op. at 59.

discussion of the procompetitive effects of AMI's presence as a potential purchaser in the market, and the alleged unwarranted hobbling effect of a prior approval requirement on hospital purchase negotiations where time is of the essence. *AMI,* slip op. at 60.

In the *HCA* opinion, the Commission is so solicitous of respondent's reporting "burden" that only a full-blown proof of the vulnerability of other local markets, extraneous to the case at hand, will justify asking respondent to provide the [5] information described above. *See, e.g., HCA* slip op. at 113–116. In other words, respondents will not be "burdened" with the duty to provide a few pieces of publicly available data before they merge, but Commission staff are asked to assume the vastly greater burden of expanding their litigated proofs of geographic market definition, barriers to entry, concentration ratios, testimony as to the nature of competition—in short, all the factors which are necessary before a certain local market can be defined and determined to be at risk from a potential future merger.

We have recently revised our procedural rules to encourage all parties to streamline and expedite administrative trials. 50 FR 41485 (Oct. 11, 1985). Why then are we now unnecessarily complicating a merger case by requiring explorations into extraneous markets? The burden on our resources, not to mention the risk to the case in chief, is not justified by the increasingly faint possibility of obtaining a prior approval order. On the Commission's commitment to such prior approval remedies, at least where hospital mergers are concerned, the time has come to point out that the emperor is wearing no clothes.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the result regarding liability and, based upon the recent precedent in *American Medical International, Inc.,* Docket No. 9158 (July 2, 1984), remedy. [104 F.T.C. 1]

Final Order

I

This matter has been heard by the Commission upon the appeals of Complaint Counsel and respondent Hospital Corporation of America from the Initial Decision and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm in part and reverse in part the Initial Decision. Accordingly, the Commission enters the following order. [2]

Definitions

It is ordered, That for purposes of this order the following definitions shall apply:

A. *HCA* means Hospital Corporation of America, a corporation organized under the laws of Tennessee, with its principal executive office at One Park Plaza, Nashville, Tennessee, and its directors, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. *HAI* means Hospital Affiliates International, Inc.

C. *County* also includes a county equivalent, such as a parish in Louisiana.

D. *Acute care hospital,* herein referred to as *hospital,* means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24–hour inpatient care, as well as outpatient services, and which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. *Acquire any hospital* means to directly or indirectly acquire all or any part of the stock or assets of any hospital, or enter into any arrangement by which HCA obtains direct or indirect ownership, management or control of any hospital or any unit of such hospital, including a lease of or management contract for any such hospital or unit of such hospital. [3]

F. *Operate a hospital* means to own, lease or manage an acute care hospital.

G. *MSA* and *PMSA* mean, respectively, a Metropolitan Statistical Area, and a Primary Metropolitan Statistical Area, as defined as of July 1, 1983, by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

H. The *Chattanooga Urban Area* means that geographic area comprising Hamilton County, Tennessee and Dade, Walker and Catoosa counties in Georgia.

I. *Person* means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

II

A. *It is ordered,* That, within twelve (12) months from the date this order becomes final, HCA shall divest, absolutely and in good faith, at no minimum price:

(1) North Park Hospital in Hamilton County, Tennessee, and all assets, properties, lands, licenses, leases, and other rights and privileges in connection with the hospital, both tangible and intangible. The divestiture required by this provision of this order specifically shall include any medical office building owned by HCA that is adjacent to, affiliated with, or operated in connection with, North Park Hospital, as well as the plot of land on which each such medical office building is situated. The purpose of this divestiture is to establish North Park Hospital as a viable competitor, and to restore competition in the area. The divestiture shall be subject to the prior approval of the Federal Trade Commission; [4]

(2) Diagnostic Center Hospital in Hamilton County, Tennessee, and all assets, properties, lands, licenses, leases, and other rights and privileges in connection with the hospital, both tangible and intangible, that HCA acquired from HAI, together with any subsequent improvements in, or additions to, any such assets or properties. The divestiture required by this provision of this order specifically shall include any medical office building owned by HCA that is adjacent to, affiliated with, or operated in connection with, Diagnostic Center Hospital, as well as the plot of land on which each such medical office building is situated. The purpose of this divestiture is to reestablish Diagnostic Center Hospital as a viable competitor, and to restore competition in the area. The divestiture shall be to a person other than the person to whom divestiture is made under Section II., Paragraph A. (1) of this order, and shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, HCA shall take all measures necessary to maintain North Park Hospital and Diagnostic Center Hospital in their present conditions and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested, so as not to impair the present operating abilities or market value of the hospitals or the other assets to be divested.

B. *It is ordered,* That, within twelve (12) months from the date this order becomes final, HCA shall divest any and all interest in, and divest or terminate all contracts or arrangements whereby it manages, Downtown General Hospital in Hamilton County, Tennessee, together with all assets, properties, lands, licenses, leases, and other rights and privileges in connection with the hospital, both tangible and intangible, that HCA acquired from HAI, together with any subsequent improvements [5] in, or additions to, such assets or properties. The divestiture required by this provision of this order specifically shall include the plot of land on which Downtown General Hospital is situated, as well as the medical office building owned by HCA that is adjacent to Downtown General Hospital, and the plot of land on

which such medical office building is situated. The purpose of this provision is to reestablish Downtown General Hospital as a viable competitor, and to restore competition in the area. Any divestiture pursuant to this provision, other than simple and unconditional termination of management contracts, leases, or other similar arrangements, shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture or termination, HCA shall take all measures necessary, within its responsibilities and authority, to maintain Downtown General Hospital in its present condition and to prevent any deterioration, except for normal wear and tear, of any assets to be divested, so as not to impair the present operating abilities or market value of the hospital or the other assets to be divested.

III

A. If HCA has not divested all of the properties, assets, contracts, arrangements or enterprises required to be divested pursuant to Section II of this order within the 12–month period provided therein, the Federal Trade Commission may select a trustee to effect any ordered divestitures yet to be accomplished. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If the Federal Trade [6] Commission should elect to appoint a trustee, it shall not be precluded from seeking civil penalties and other relief available to it for any failure by HCA to comply with this order. If the Federal Trade Commission should not elect to appoint a trustee under this Section III of this order, it shall not be precluded from seeking civil penalties, the appointment by the courts of a trustee to effect the divestitures, and other relief available to it, for any failure by HCA to comply with this order.

B. Any trustee appointed by the Federal Trade Commission pursuant to this Section shall have the following powers, authority, duties, and responsibilities:

(1) The trustee shall have the exclusive power and authority to divest any properties, assets, or enterprises required to be divested pursuant to Section II of this order that have not been divested by HCA within the time period for the divestitures provided therein. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures, which shall be subject to the prior approval of the Federal Trade Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Federal Trade

Commission. In addition, any delays in divestiture caused by HCA shall extend the time for divestiture in accordance with the delay caused.

(2) The trustee shall have full and complete access to the personnel, books, records, and facilities of any property, asset, or enterprise that the trustee has the duty to divest, and HCA shall develop such financial or other information relevant to the properties, assets, or enterprises to be divested as such trustee may reasonably request. HCA [7] shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(3) The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price, and the purposes of the divestitures as stated in Section II of this order.

(4) The trustee shall serve, without bond or other security, at the cost and expense of HCA on such reasonable and customary terms and conditions as the Federal Trade Commission may set. The trustee shall have authority to retain, at the cost and expense of HCA, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestitures. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Federal Trade Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to HCA and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

(5) HCA shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Federal Trade Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the willful or wanton acts or bad faith of the trustee. [8]

(6) Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, HCA shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause the divestitures.

(7) If the trustee ceases to act or fails to act diligently, the Federal Trade Commission shall appoint a substitute trustee.

(8) The trustee may ask the Federal Trade Commission to issue, and the Federal Trade Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the divestitures required under this order.

(9) The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, contracts, arrangements or enterprises required to be divested pursuant to Section II of this order.

(10) The trustee shall report in writing to HCA and the Federal Trade Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, HCA shall not, without the prior approval of the Federal Trade Commission, acquire any hospital, as defined in this order, if the hospital to be acquired is within the Chattanooga Urban Area, as defined in this order. [9]

Provided, however, that no acquisition of a hospital by purchase shall be subject to this Section IV of this order if the consideration to be paid for the purchase of the hospital or any rights or interest therein, including assumption by HCA of any liabilities of its present owners, does not exceed one million dollars ($1,000,000), and provided that no lease or management arrangement shall be subject to this Section IV of this order if the fair market value of the hospital to be leased or managed does not exceed one million dollars ($1,000,000).

V

It is further ordered, That for a period of ten (10) years from the date this order becomes final, HCA shall not, without providing advance notification to the Federal Trade Commission, acquire any hospital, as defined in this order, if:

A. The hospital to be acquired is within an MSA or a PMSA in which HCA already operates a hospital and in which HCA, immediately after the acquisition, would operate hospitals that combined have a twenty (20) percent or more share of the licensed acute care hospital beds within that MSA or PMSA; or

B. The hospital to be acquired is not within an MSA or a PMSA but is within a county in which HCA already operates a hospital and in which HCA, immediately after the acquisition, would operate hospitals that combined have a twenty (20) percent or more share of the licensed acute care hospital beds within that county; or

C. The hospital to be acquired is (1) not within an MSA or a PMSA or a county in which HCA already operates a hospital, but is within thirty (30) miles of a hospital which HCA already operates in another MSA or PMSA or county, and (2) the hospital to be acquired and any hospital(s) that HCA operates combined [10] have a twenty (20) percent or more share of the licensed acute care hospital beds in the area within thirty (30) miles of the midpoint between the hospital to be acquired and any hospital operated by HCA.

The notification required of HCA by this Section V of this order shall not require additional notification by HCA to the Federal Trade Commission of any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Federal Trade Commission is required, and has been requested, pursuant to Section IV of this order. Such advance notification shall be provided when HCA's Board of Directors or Executive Committee, or any individual or entity that is authorized to act on HCA's behalf in such acquisitions, authorizes issuance of a letter of intent or enters into an agreement to make such an acquisition, whichever is earlier.

The notification required by this Section V of this order shall be the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part. The notification required by this Section V of this order shall apply to HCA and shall not apply to any party that HCA seeks to acquire. However, HCA shall provide at the same time of the filing of the Notification and Report Form supplemental information, either in HCA's possession or reasonably available to HCA, relating to the hospital to be acquired, the HCA hospital in that geographic [11] area, and identification and assessment of the area hospital market. Such supplemental information should include, where available, patient flow data, annual management and strategic plans, hospital utilization and revenue data, and documents relating to market share, formulation of hospital prices, competitive interaction among area hospitals, implementation of certificate of need standards in the area, planned efficiencies, relations with third-party payors, and physician admitting patterns.

HCA shall comply with reasonable requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Any acquisition subject to this Section V of this order, involving an arrangement to lease, manage, or control a hospital, shall be fully described in the notification regardless of whether the acquisition involves the acquisition of any stock or assets of a hospital.

Provided, however, that no acquisition of a hospital by purchase shall be subject to this Section V of this order if the consideration to be paid for the purchase of the hospital or any rights or interest therein, including assumption by HCA of any liabilities of its present owners, does not exceed one million dollars ($1,000,000), and provided that no lease or management arrangement shall be subject to this Section V of this order if the fair market value of the hospital to be leased or managed does not exceed one million dollars ($1,000,000). [12]

VI

It is further ordered, That HCA shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Section II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may request, a summary of all contacts and negotiations with potential purchasers of the stock, assets, contracts, or other rights or interests to be divested under this order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

HCA shall submit such further written reports as the staff of the Federal Trade Commission may, from time to time, request in writing to assure compliance with this order.

VII

It is further ordered, That HCA, upon written request of the Secretary of the Federal Trade Commission or the Director of the Bureau of Competition of the Federal Trade Commission made to HCA at its principal office, for the purpose of securing compliance with this order, and for no other purpose, and subject to any legally recognized privilege, shall permit duly authorized [13] representatives of the Federal Trade Commission or the Director of the Bureau of Competition:

(1) reasonable access during the office hours of HCA, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in

HCA's possession or control that relate materially and substantially to any matter contained in this order; and

(2) an opportunity, subject to the reasonable convenience of HCA, to interview officers or employees of HCA, who may have counsel present, regarding such matters.

VIII

It is further ordered, That HCA shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this order.

IN THE MATTER OF

SERVICE ONE INTERNATIONAL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3172. Complaint, Oct. 29, 1985—Decision, Oct. 29, 1985

This consent order requires a Chatsworth, Calif. credit counseling service and two corporate officers, among other things, to cease misrepresenting that they will obtain credit or credit cards for applicants; have developed working relationships with any creditors; or will provide a full or partial refund of any fees paid by consumers seeking credit or credit cards. Additionally, respondents are prohibited from misrepresenting the likelihood of any consumer obtaining credit or credit cards; the extent to which it can help consumers seeking credit or credit cards; or the conditions under which it will furnish refunds. Further, respondents are required to send to all customers who paid for the service and did not receive a credit card, a notice that gives them the option of receiving a full refund within 30 days or participating in respondents' new credit-counseling service without additional charge.

Appearances

For the Commission: *David G. Grimes, Jr.*.

For the respondents: *Robert L. Mabee,* Sioux Falls, S.D.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Service One International Corporation, a corporation, also trading and doing business as Service One Corporation and First Credit Services, and Reza Fayazi and Ali Fayazi individually and as a former officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Service One International Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 21032 Devonshire Street, Suite 215, Chatsworth, California. Service One International Corporation also

trades and does business as Service One Corporation and First Credit Services.

Respondents Reza Fayazi and Ali Fayazi are officers of Service One International Corporation. They have formulated, directed and controlled the acts and practices of Service One Corporation, including the acts and practices hereinafter set forth. Their address is the same as that of Service One International Corporation.

PAR. 2. Respondents are now, and for some time in the past have been preparing and causing the dissemination of retail advertising and promotional material to the public describing services and soliciting business. Respondents have caused such advertising and promotional material to be disseminated by various means, including insertion in magazines with national circulation that are distributed through the mail across state lines, and direct distribution through the mail across state lines. Typical statements in said advertisements and promotional materials, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits 1 through 3.

PAR. 3. Respondents maintain and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business through advertisements, promotional literature or other written materials, including Exhibits 4, 5, 6, and 7, attached hereto, respondents have made the following statements:

Get Credit Visa/Mastercard Call Toll Free 1–800–423–2714

NOW YOU CAN GET THE CREDIT YOU WANT through FirstCreditServices . . . HOW DO I APPLY??? Complete the information requested. Sign the application as indicated. Return this form and your check or money order in the postage-paid envelope today. Processing of your application normally takes three weeks. Applications received without the required fee will not be processed. . . .

FIRSTCREDITSERVICES CREDIT CARD APPLICATION . . .

. . . Let us get you the credit you desire . . .

Please accept this invitation to VISA, MasterCard, and the world of credit. Simply complete the enclosed application form and return it with your $25 check or money order in the postage-paid envelope. Your application will be processed within three weeks . . .

FCS has developed working relationships with banks across the country which will issue our clients' VISA and MasterCard regardless of past credit experience.

PAR. 5. By statements such as the ones set forth in Paragraph Four, respondents have represented, directly or by implication, that they will obtain credit cards for consumers for a fee, and that they have

working relationships with banks that will issue such credit cards to consumers regardless of past credit experience.

PAR. 6. In truth and in fact, respondents do not obtain credit cards for consumers after payment of fees, and have not developed any working relationship with banks that will issue such credit cards regardless of past credit experience. Therefore the representations set forth in Paragraph Five were and are false and misleading.

PAR. 7. In the course and conduct of their business, in connection with the representation in Paragraph Five, *supra,* through advertisements, promotional literature or other written materials, including Exhibits 6 and 7, attached hereto, respondents have made the following statements:

In the event you are unable to obtain credit, a full refund will be made with (sic) 20 days. If FCS cannot successfully process your application, your uncashed check or money order will be returned to you.

What if I can't get credit? If you are unable to obtain credit, FCS will refund your fee in full within 20 days. If FCS cannot process your application for any reason, your uncashed check or money order will be returned to you immediately.

PAR. 8. By statements such as those in Paragraph Seven, respondents have represented, directly or by implication, that consumers who have paid a fee to respondents to obtain a credit card but do not receive a credit card will obtain from respondents a full refund of the fee paid.

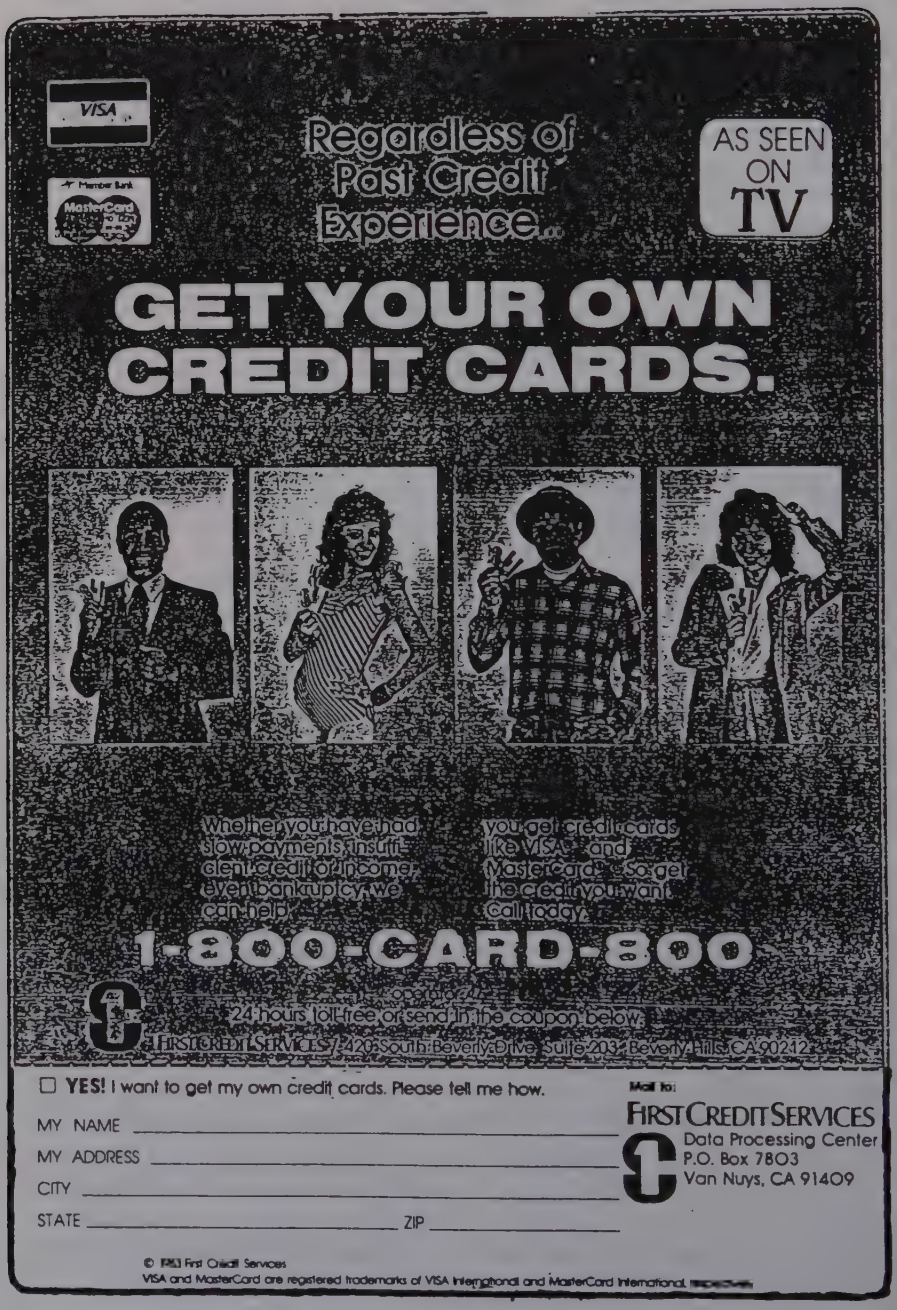
PAR. 9. In truth and in fact, a substantial number of consumers who have paid $25 to $50 in fees to respondents to obtain a credit card and have not received a credit card have not received any refund despite having requested one. Of those consumers who have received a refund, a substantial number have received only a partial refund, with a $10 "processing fee" withheld. Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 10. The use by respondents of the aforesaid, false and misleading representations has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' services in reliance on said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. The acts and practices of respondents, as herein

alleged, are continuing and will continue in the absence of the relief hereby requested.

EXHIBIT 1


VISA
Member Bank
MasterCard
Regardless of Past Credit Experience...
AS SEEN ON TV
GET YOUR OWN CREDIT CARDS.
Whether you have had slow payments, insufficient credit or income, even bankruptcy, we can help.
you get credit cards like VISA® and MasterCard®, so get the credit you want. Call today.
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or write
24 hours toll-free, or send in the coupon below.
FIRST CREDIT SERVICES / 420 South Beverly Drive, Suite 203 / Beverly Hills, CA 90212
YES! I want to get my own credit cards. Please tell me how.
MY NAME
MY ADDRESS
CITY
STATE ZIP
Mail to:
FIRST CREDIT SERVICES
Data Processing Center
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Van Nuys, CA 91409
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EXHIBIT 2

Wednesday

4:30 PM to 5:30 PM

BENNY HILL—Comedy

4:35 HOGAN'S HEROES—Comedy

5 PM 2 4 7 NEWS

5 LITTLE HOUSE ON THE PRAIRIE
Miss Beadle (Charlotte Stewart) and Nellie (Alison Arngrim) fall for a hog farmer and his son. (60 min.)

9 VIDEO ONE—Music
Included: Pat Benatar, John Cougar Mellencamp, Culture Club. (60 min.)

11 ONE DAY AT A TIME—Comedy
Nick won't let Alex get away with turning in a shoddy science project. Nick: Ron Rifkin.

13 BEWITCHED—Comedy
Sam spends a harrowing weekend with Darrin's parents.

18 HEIDI—Novela

24 50 3-2-1 CONTACT (CC)
Ant behavior is examined by Miguel.

28 3-2-1 CONTACT (CC)—Children
A look at an automobile assembly line.

34 EN BUSCA DEL PARAISO —Novela

40 UP ON MELODY MOUNTAIN —Religion

56 ESN COLLEGE BASKETBALL
Fordham at Notre Dame. (Live)

ART SEASON PREVIEW

CNN NEWS—Dobbs/Ladendorf

HBO EVERLY BROTHERS—Music

ON COLLEGE BASKETBALL
Tulane at Louisville. (Live)

TMC MOVIE—Comedy
"Lovesick." (1 hr., 40 min.)

USA COLLEGE BASKETBALL
Villanova at St. John's. (Live)

5:05 TBS MOVIE—Drama
"Oklahoma Crude." (1973) George Scott and Faye Dunaway play rough in this brawling saga of the Southwestern oil fields in 1913. Doyle: John Mills. (2 hrs., 10 min.)

5:30 3 M*A*S*H
Not all MASH personnel work up a sweat over the impending visit of Gen. Douglas MacArthur.

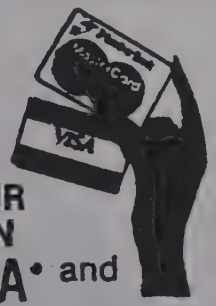
11 JEFFERSONS (CC)—Comedy
George (Sherman Hemsley) recalls the day he struggled to open his first store—the day of Martin Luther King Jr.'s assassination.

13 ANDY GRIFFITH—Comedy BY
Opie (Ronny Howard) accidentally handcuffs a friend to the flagpole.

24 IN RECITAL
Piano duo Ralph and Albertine Votapek perform Rachmaninoff's Suite No. 2 for Two Pianos, Op. 17.

28 SPACES (CC)—Children
A study of computer technology in-

REGARDLESS OF CREDIT EXPERIENCE



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State _____ Zip _____
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Beverly Hills, CA 90212
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EXHIBIT 3

★ Regardless of Past Credit Experience

GET YOUR OWN VISA® and MASTERCARD® CREDIT CARDS

FIRST CREDIT SERVICES can help you get your own credit cards, including VISA® and MASTERCARD® credit cards, even if you have

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- No Credit
- Slow Payments
- Even bankruptcy!

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CREDIT LINE NUMBER

1-800-CARD-800

Operator 100

Call Toll Free 24 Hours

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Address _____

City _____

State _____ Zip _____

Mail to: FIRST CREDIT SERVICES, Data Processing Center, P.O. Box 7803, Van Nuys, CA 91409

FIRST CREDIT SERVICES
420 South Beverly Drive
Suite 203
Beverly Hills, CA 90212

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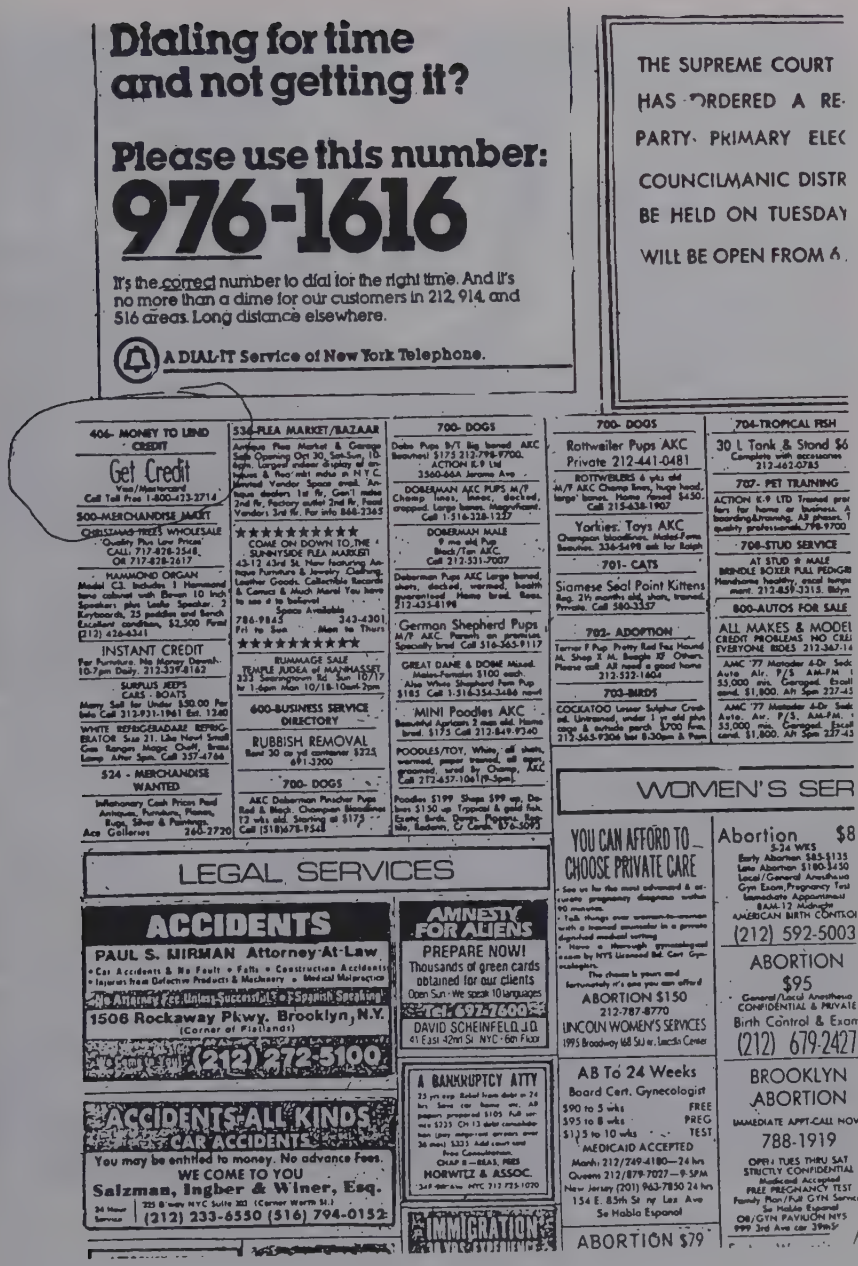
EXHIBIT 4



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Board Cert. Gynecologist
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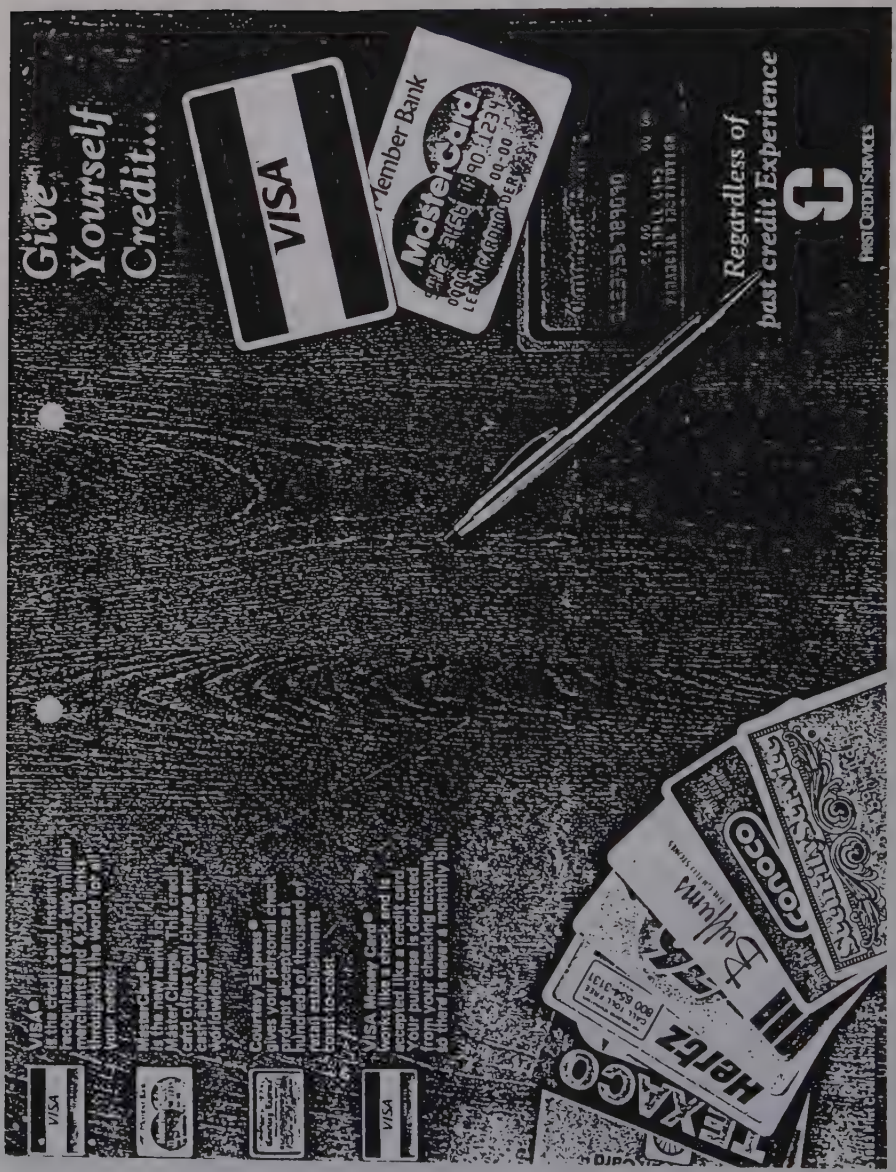
EXHIBIT 5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MasterCard
Member Bank
Regardless of past credit Experience
First Credit Services
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It's the credit card recognized at over two million merchants and 2,200 banks throughout the world for all your needs.
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It's the new name for Master Charge. This credit card offers you charge and cash advance privileges worldwide.
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HOW DO I APPLY???

Complete the information requested.

Sign the application as indicated.

Return this form and your check or money order in the postage-paid envelope today.

Processing of your application normally takes three weeks. Applications received without the required fee will not be processed

FIRST CREDIT SERVICES

CREDIT CARD APPLICATION

NAME OF APPLICANT FIRST MIDDLE INITIAL LAST PLEASE PRINT LEGIBLY WITH DARK INK

(OPTIONAL) MR MRS MS MR & MRS

SOCIAL SECURITY NO

ADDRESS APT NO CITY STATE ZIP CODE NO YRS

MONTHLY PAYMENT $ ☐ RENT ☐ OWN ☐ LIVE WITH PARENTS ☐ OTHER DATE OF BIRTH AGE AREA CODE ( ) HOME TELEPHONE NO OF DEP

PREVIOUS ADDRESS APT NO CITY STATE ZIP CODE NO YRS

PRESENT EMPLOYER ADDRESS CITY STATE ZIP CODE

POSITION/RANK BUSINESS PHONE YEARLY SALARY OR COMMISSIONS $ YRS WITH FIRM

*OTHER SOURCE OF INCOME (Alimony child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation) YEARLY $ AMOUNT

PREVIOUS EMPLOYER ADDRESS CITY STATE ZIP CODE POSITION/RANK YRS WITH FIRM

NAME AND ADDRESS OF NEAREST RELATIVE NOT LIVING WITH APPLICANT PHONE ( )

APPLICANT'S DRIVERS LICENSE NUMBER

JOINT APPLICANT'S DRIVERS LICENSE NUMBER

COMPLETE IF JOINT ACCOUNT IS DESIRED JOINT APPLICANT'S FULL NAME DATE OF BIRTH AGE

NAME AND ADDRESS OF JOINT APPLICANT'S PRESENT EMPLOYER SOCIAL SECURITY NO

YEARLY SALARY OR COMMISSIONS $ BUSINESS PHONE POSITION/RANK NO OF YEARS

OFFICE USE ONLY

I/We certify the information provided is correct. I authorize you to investigate my credit report if so required to process this application. I understand that FIRST CREDIT SERVICES will assist me in obtaining credit or my fee will be refunded. I further understand that a savings and/or checking account may be required. I understand that the contents of this application will remain confidential

Signature _____ Date _____ Joint Applicant _____

EXHIBIT 6

DATE: &DATE&

REFER TO: &CLIENTNO&

&FNAME& &LNAME&
&STREET&
&CITY&, &STATE& &ZIP1&

FIRSTCREDITSERVICES

Dear &FNAME& &LNAME&:

Thank you for your interest in FirstCreditServices.

Whether you have a bankruptcy, slow payments,insufficient credit or income, you can have a VISA and MasterCard.

Each month, thousands of consumers with credit problems become credit cardholders through FirstCreditServices. That's why we have become "America's Credit Expert." Our service starts when we receive your completed application, and it ends when you have a VISA and MasterCard, department store and oil company cards,and a check guarantee card.

The good life and good credit go hand in hand. Let us get you the credit you desire so you can purchase furniture, stereos, and clothes or take a vacation.

Please accept this invitation to VISA, MasterCard, and the world of credit. Simply complete the enclosed application form and return it with your $25 check or money order in the postage-paid envelope. Your application will be processed within three weeks.

If you don't receive credit, your fee is returned. In full. Within 10 days.

If you require further information, please call (213) 709-2072 and a member of our staff will gladly assist you.

I am looking forward to the day when a VISA and MasterCard are yours, &FNAME& &LNAME&.

Sincerely,

Henry A. McDonald III
FirstCreditServices
Consumer Credit Division

EXHIBIT 7

FIRST CREDIT SERVICES

(800) 423-2714
Operations Center
13615 Victory Blvd.
Suite 117
Van Nuys, CA 91401

CORPORATE OFFICES
420 So. Beverly Drive
Suite 207
Beverly Hills, CA
90212

(213) 786-0941
Telemarketing Center
P.O. Box 77
Van Nuys, CA 91408

Dear Consumer:

Thank you for your interest in First Credit Services. FCS is a nationwide service organization which successfully assists thousands of consumers each year to become credit cardholders.

FCS has developed working relationships with banks across the country which will issue our clients' VISA and MasterCard regardless of past credit experience. For the vast majority of our clients, no savings account deposit is required. Our Total Credit Concept® provides integrated credit counseling.

How does the Total Credit Concept® operate? When your completed application is received, one of our counseling staff will evaluate your credit profile in sixteen separate categories. This financial and credit data is then used to match your application to the requirements of our selected banks. Institutions will be selected for your successful applications for VISA and MasterCard. Further, local department stores which will extend your credit will be selected from our data bank. In addition, an institution from which you will receive a Check Guarantee Card will be selected. Also, one of eleven proven legal methods will be selected for your use in removing any unfavorable information from your credit file.

All of this information selected for you is then transcribed into a written portfolio of between 15 to 28 pages. Your portfolio is then forwarded to you. After its receipt, you will complete the Total Credit Concept® Program by receiving personal credit reports, removing any unfavorable past credit data from your credit file, and submit applications for VISA and MasterCard to the selected banks. Fifteen days are required for processing and arrival of your portfolio. Your assigned counselor is available for telephone consultations at no charge whenever the need arises.

We at FCS know good credit is a necessity, not a luxury. Because FCS pioneered consumer credit advisement, our total fee is only $30. There are no further fees or costs. Our fee includes all processing and one copy of your written portfolio. In the event you are unable to obtain credit, a full refund will be made with 20 days. If FCS cannot successfully process your application, your uncashed check or money order will be returned to you.

Please accept your invitation to VISA, MasterCard, and the world of credit. Simply complete and return the enclosed application form along with your check or money order in the amount of $30, using the postage-paid envelope provided. If you require further information, please call 213/989-6046 and a member of our staff will assist you.

Thanking you for this opportunity to be of service, I remain,

Sincerely,

Henry A. McDonald

Henry A. McDonald III
Director/Credit Services Division

Enclosure

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Service One International Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 21032 Devonshire Street, Chatsworth, California. Respondents Reza Fayazi and Ali Fayazi are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is hereby ordered, That respondents Service One International Corporation, a corporation, its successors and assigns, and its officers, and Reza Fayazi and Ali Fayazi individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of any service or material purporting to secure, or to assist in securing, credit or a credit card for any consumer(s) or to assist any consumer(s) in obtaining credit or a credit card, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, contrary to fact, that they:

(a) Will obtain credit or a credit card for, or will send a credit card to, any member of the public;
(b) Have developed any working or other relationship with any credit card issuer or other creditor that issues or will issue credit cards or grants or will grant credit;
(c) Will provide a full or partial refund of any fee paid to secure or obtain credit or a credit card.

2. Misrepresenting in any manner:

(a) The conditions under which any consumer can secure or obtain credit or a credit card or the likelihood that any consumer will secure or obtain credit or a credit card, including, but not limited to, the percentage or number of credit applicants who receive credit and whether bankruptcy, no credit history or a prior, adverse credit history make it more difficult to secure or obtain credit or a credit card;
(b) The extent to which help will be given any consumer to secure or obtain credit or a credit card;
(c) The conditions under which any refund will be furnished to any consumer.

II.

It is further ordered, That respondent Service One International Corporation shall:

1. Within twelve months after the date of service of this order, send by first class mail in the manner described below, a copy of the notice that is affixed hereto as Attachment A, to each person who between

February 1, 1982, and the date of service of this order paid money to First Credit Services in connection with its credit card program and has not received a refund of the full amount paid. If ninety percent or more of the customers to whom the notice is sent within the first three months after the date of service of this order return the notice within six months after the date of service of this order, the words "twelve months" in the first line of subparagraph 1 are changed to "eighteen months." The notice shall appear by itself in not less than 12 point bold face type, on one side of a sheet of paper not less than 8½ inches by 11 inches. The print shall be black and the color of the paper shall be yellow. The notice shall be accompanied by a postage-prepaid, addressed return envelope. The notice may be accompanied by not more than 3 other pieces of paper, none of which shall be larger than the notice or the same color as the notice. The notice shall be mailed to the customer at the last known address shown in respondent's records for said customer. The face of the envelope in which the notice is mailed to the customer shall contain the following phrase printed in 12 point bold face type: "First Credit Services-Refund Offer."

2. Send by first class mail a refund check to each customer who returns the notice with Option 1 checked. Service One International Corporation shall also mail a refund check to each such customer who requests a refund by any other method. In each case the refund check shall be made payable to the customer for the total amount the customer paid, less any refund previously provided the customer and be mailed within 30 days of receipt of the notice or other request to the address the customer provides. If the customer does not provide an address, the check shall be mailed to the address to which the notice described in II(1) was mailed or to the customer's last known address, whichever is most recent.

3. Within thirty days of receipt of the notice, send by first class mail to each customer who returns the notice with Option 2 checked, to the address the customer provides:

(a) (1) a letter stating that the customer has been approved for a Visa or MasterCard credit card together with the name and address of the institution to which the customer should send the $250 to serve as a minimum balance for the savings account; and

(2) a postage prepaid envelope made out to that name and address; or

(b) (1) a letter stating that the customer has not been approved for a Visa or MasterCard credit card (which letter shall be in addition to the adverse action notice required by the Equal Credit Opportunity

Act, 15 U.S.C. 1691 *et seq.*, and Section 202.9 of Regulation B, 12 C.F.R. 202); and

(2) a refund check payable to that customer for the total amount the customer paid, less any refund previously provided the customer.

If the customer does not provide an address, the items shall be mailed to the address to which the notice described in Paragraph 1 of Section II was mailed or to the customer's last known address, whichever is most recent.

4. Within thirty days after receipt of $250 by the card issuing institution on behalf of each customer described in Subparagraph 3(a), above, send such customer by first class mail a Visa or MasterCard credit card in that customer's name, which that customer may use in connection with a credit card account opened in his or her name. The address to which the card shall be sent shall be determined in the manner described in Paragraph 3, above.

III.

It is further ordered, That respondents shall maintain for at least three (3) years and, upon request, make available to the Federal Trade Commission for inspection and copying:

1. Copies of all advertising and promotional materials concerning any service or material offered to help secure or obtain credit or a credit card.

2. Copies of all advertising and promotional materials concerning any offer of a refund.

3. Copies of all requests made for a refund and of all correspondence and other records relating to such requests, as well as evidence of what refunds are made.

IV.

It is further ordered, That respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporate structure of respondents that may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondents shall deliver a copy of this order to each present and future employee engaged in preparing or

making any oral or written representations to consumers concerning the securing or obtaining of credit or a credit card or the making of any refund offer or engaged in the granting or denying of refund requests and obtain from such person a signed statement acknowledging receipt of a copy of this order.

VI.

It is further ordered, That respondents herein shall within sixty (60) days after the date of service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ATTACHMENT A

PREVIOUS SUBSCRIBERS OF FIRST CREDIT SERVICES:

NOTE THIS REFUND OFFER

If you previously paid money to First Credit Services to get a credit card, you may choose either Option 1, or Option 2, as part of an agreement with the Federal Trade Commission.

Option 1. If you decide not to participate in Service One Corporation's new credit offer outlined below, Service One will refund to you the money you paid to First Credit Services, if you so request.

Option 2. You may apply for a Visa/Mastercard credit card through Service One Corporation, using the enclosed application, and you pay *no processing fee.* To obtain a card, from us you must establish and maintain a savings account with a minimum balance of $250 with the card issuer and you will be billed for a $35 annual card fee. If your application is rejected, we will automatically refund in full any fee you paid to First Credit Services when you previously applied to First Credit Services for credit.

CHECK THE APPROPRIATE BOX, FILL IN YOUR NAME AND ADDRESS, AND RETURN THIS FORM IN THE ENCLOSED BUSINESS REPLY ENVELOPE.

Option 1 ( ) Please refund the money I paid to First Credit Services.

Option 2 ( ) Please accept my enclosed application for a Visa or Mastercard credit card with no processing fee.

Name _____

Street _____

City _____, State _____ Zip _____

For refund assistance or more information, you may write or call us:

Service One Corporation
Consumer Affairs Department
21032 Devonshire Street
Chatsworth, California 91311

Phone (818) 709–2072

IN THE MATTER OF

NATIONAL ASSOCIATION OF TEMPORARY SERVICES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3173. Complaint, Nov. 5, 1985—Decision, Nov. 5, 1985

This consent order requires an Alexandria, Va. association of temporary help companies, among other things, to cease engaging in any practices or maintaining any code of ethics provision or other written provision that has the purpose or effect of restraining the recruitment or employment of employees registered with another temporary help firm; the solicitation of another temporary help firm's clients; and the provision of temporary help employees to companies involved in a strike or lock-out. The Association is barred from affiliating or federating any organization of temporary help firms that has adopted by-laws or a code of ethics containing a prohibited provision; and required to maintain records relating to disaffiliations and refused affiliations or federations for three years. The order further requires that the Association send a copy of the complaint and order, together with an explanatory letter, to each of its current members and provide a copy of the order to all new members for a period of three years.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Arthur L. Herold, Webster, Chamberlain & Bean,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Association of Temporary Services, Inc., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Definitions: For purposes of this complaint, the following definitions shall apply:

A. The term *temporary help employees* shall mean employees who are assigned to work for customers on a nonpermanent basis.

B. The term *temporary help firms* shall mean businesses employing temporary help employees.

C. The term *registration* shall mean the written, oral or other agreement of temporary help employees to be available to a temporary help firm for assignment to jobs.

PARAGRAPH 1. Respondent National Association of Temporary Services, Inc. (hereafter "NATS"), is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia. Its headquarters is at 119 South Saint Asaph St., Alexandria, Virginia.

PAR. 2. NATS is a trade association with approximately 400 members located in most of the states of the United States. It operates in substantial part for the economic benefit of its members and is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended.

Among its other activities, NATS has issued codes of ethical conduct for its members.

PAR. 3. Members of NATS primarily provide temporary help employees to businesses in the office/clerical, technical/professional, industrial, and medical fields. For supplying such employees, NATS members charge and receive payment from the businesses, usually at an hourly rate. The members in turn pay the temporary help employees for their work.

To have temporary help employees available to provide to businesses, NATS members and other firms in the temporary help industry make efforts to obtain the registrations of individuals who will work for them. These efforts may include advertising and direct solicitation of persons employed by other temporary help firms.

Except to the extent that competition has been restrained as herein alleged, members of NATS have been and now are in competition among themselves and with other temporary help firms in the procurement and sale of temporary services.

PAR. 4. Some of the members of NATS are firms with offices in many of the major cities of the United States and in the District of Columbia. These firms and other NATS members supply temporary help services across state lines and in the District of Columbia. NATS members also send and receive money, personnel, and communications across state lines as a regular and customary part of their business. As a result of these activities the acts and practices of NATS and its members, including those complained of in this complaint, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 5. NATS and its members have entered into a combination and arrangement to maintain code of ethics provisions and to engage in acts or practices, such as providing advice on the propriety of conduct,

that have the purpose or effect of restricting, restraining, limiting, or preventing:

1. the solicitation, the recruitment, or the employment by temporary help firms of the temporary help employees registered with other temporary help firms;

2. the solicitation of and advertising directed to the customers of temporary help firms by other temporary help firms;

3. the providing of temporary help employees to potential or existing customers of temporary help firms who are involved in a strike or a lock-out.

PAR. 6. The purpose or effect of NATS' acts and practices as alleged in Paragraph Five has been to restrain trade and hinder competition in the procurement of registrations of temporary help employees, in the solicitation of customers of temporary help firms by other temporary help firms, and in the providing of temporary help employees to potential or existing customers who are engaged in a strike or lock-out.

PAR. 7. The acts, practices and methods of competition described in Paragraphs Five and Six are unfair methods of competition which violate Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record

for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Association of Temporary Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 119 South Saint Asaph Street, in the City of Alexandria, Commonwealth of Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. The term *NATS* means the National Association of Temporary Services, Inc., its successors or assigns, and its officers, board members, directors, committees, agents, representatives and/or employees.

B. The term *temporary help employees* shall mean employees who are assigned to work for customers on a non-permanent basis.

C. The term *temporary help firms* shall mean businesses employing temporary help employees.

D. The term *registration* shall mean the written, oral or other agreement of temporary help employees to be available to a temporary help firm for assignment to jobs.

II.

It is ordered, That NATS, directly or indirectly, or through any corporate or other device, in or affecting commerce, shall cease and desist from:

A. Maintaining any code of ethics provision, or other written provision, such as Paragraph 7 of the Code of Ethics, Paragraphs 5 and 7 of the Code of Fair Practices for Temporary Office/Clerical Services, and Paragraph 9 of the Code of Employment Practices for Medical Services which are contained in the NATS membership directory for

1983–1984, or engaging in any acts or practices, such as providing advice on the propriety of conduct, that have the purpose or effect of restricting, restraining, limiting, or preventing:

1. the solicitation, through advertising or otherwise, the recruitment, or the employment by any temporary help firm of the temporary help employees registered with any other temporary help firm;

2. the solicitation, through advertising or otherwise, of customers of a temporary help firm by any other temporary help firm;

3. the providing of temporary help employees to potential or existing customers who are involved in a strike or a lock-out.

B. Affiliating or federating as set forth in the NATS by-laws, or continuing an affiliation or federation, with any organization of temporary help firms that:

1. has adopted any by-law, code of ethics, or other provision that violates Section II.A of this order; or

2. has engaged in any act or practice that, to NATS' knowledge, violates Section II.A of this order after the date of service of this order.

III.

It is further ordered, That NATS shall:

A. Send to each of its members within thirty (30) days after the date of service of this order a copy of the complaint and decision and order in this matter, along with the letter attached to this order.

B. Provide written notice of the name and address of any organization of temporary help firms within twenty (20) days of the disaffiliation or refusal of affiliation or federation pursuant to Section II.B of this order. The notice shall be sent to the Assistant Director for Compliance, Bureau of Competition, Federal Trade Commission and shall reference this matter by name of case and docket number. NATS shall keep for three (3) years all papers and records pertaining to disaffiliations and refused affiliations or federations pursuant to this paragraph.

C. Provide for a period of three (3) years from the date of service of this order to each new NATS member and affiliate a copy of the complaint and decision and order in this matter. These documents shall be provided not later than thirty (30) days after the new member is accepted into membership or the organization is accepted as an affiliate.

IV.

It is further ordered, That NATS shall, within ninety (90) days after service of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, That NATS shall notify the Commission at least thirty (30) days prior to any proposed change in NATS including, but not limited to, disbanding, dissolution, assignment, the formation of a successor or substitute entity, or any other change in NATS which may affect compliance obligations arising out of this order.

ATTACHMENT

[NATS letterhead]

Dear Member:

This letter is to notify you that, without admitting liability for any wrongdoing, we have voluntarily entered into an agreement with the Federal Trade Commission which resulted in the entry of a consent order on [enter date of order]. The order requires that the National Association of Temporary Services, Inc. not engage in certain practices. Copies of the complaint and order are included.

In accordance with the terms of the order, you are hereby notified that, among other requirements of the order, NATS shall not restrict, restrain or in any way interfere through application of the NATS Codes of Ethics or otherwise with 1) the solicitation, through advertising or otherwise, the recruitment, or the employment by any temporary help firm of the temporary help employees of any other temporary help firm; 2) the solicitation, through advertising or otherwise, of customers of a temporary help firm by any other temporary help firm; or 3) the providing of temporary help employees to customers who are engaged in a strike or a lock-out.

Moreover, if any NATS affiliate association uses a code of ethics to restrict or limit the solicitation or recruitment of temporary help, such action will result in NATS disaffiliating with that association.

As you may know, we previously repealed the specific language in the Code of Good Practices for Office Services which had condemned direct solicitation of individuals employed by competing firms. The terms of the consent agreement with the FTC are consistent with this change in the Code of Good Practices.

This letter summarizes the important parts of the order, but you should read it carefully in its entirety.

Sincerely,

Samuel R. Sacco
Executive Vice-President

IN THE MATTER OF

COLUMBIAN ENTERPRISES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9177. Complaint, May 8, 1984—Decision, Nov. 13, 1985

This consent order requires a Tulsa, Okla. producer and distributor of carbon black, a component in the manufacture of natural and synthetic rubber, among other things, to obtain Federal Trade Commission approval before acquiring substantial assets or stock in its competitors' production facilities. Such approval is needed if the total acquisitions over a five year period would increase the respondent's yearly carbon black production capacity by 130 million pounds or more.

Appearances

For the Commission: *Michael Wise.*

For the respondents: *C. Loring Jetton, Jr., John Rounsaville, Jr.* and *Robert M. Pozin, Wilmer, Cutler & Pickering,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Columbian Enterprises, Inc. ("Columbian") intends to acquire all of the voting securities of Continental Carbon Company ("Concarb"), a wholly owned subsidiary of Conoco Inc. ("Conoco"), in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. COLUMBIAN ENTERPRISES, INC.

1. Respondent Columbian Enterprises, Inc. is a corporation organized and existing under the laws of the State of New York with its corporate headquarters at 425 Park Avenue, New York, New York.

II. CONOCO INC.

2. Respondent Conoco Inc. is a corporation organized and existing under the laws of the state of Delaware with its corporate headquarters at 1007 Market Street, Wilmington, Delaware.

III. JURISDICTION

3. At all times relevant herein, each of the companies named in this Complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12), and Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

IV. THE PROPOSED ACQUISITION

4. On November 12, 1983, Columbian entered into an agreement to acquire 100 percent of the voting securities of Concarb.

V. TRADE AND COMMERCE

5. The relevant product market in which to assess the competitive effects of the acquisition is the market for carbon black.

6. The relevant geographic market in which to assess the competitive effects of the acquisition is the United States.

7. The relevant market is highly concentrated.

8. Barriers to entry into the production and distribution of the relevant product are substantial.

9. Both Columbian and Concarb are substantial competitors in the relevant product and geographic markets.

VI. EFFECTS OF THE PROPOSED ACQUISITION

10. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in the following:

(a) Eliminate substantial actual competition between Columbian and Concarb in the relevant market;

(b) Eliminate Concarb as a substantial competitor in the relevant market;

(c) Substantially increase concentration in an already highly concentrated market, therefore increasing the likelihood of collusion;

(d) Encourage additional mergers or acquisitions in the relevant market, thereby further increasing the likelihood of collusion;

(e) Tend to reduce the degree of price competition in the relevant market;

(f) Tend to reduce the volume of production of carbon black below competitive levels; and

(g) Tend to reduce actual competition among other companies engaged in the production and distribution of the relevant product.

VII. VIOLATIONS CHARGED

11. The proposed acquisition constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Columbian Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 425 Park Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this order the following definitions shall apply:

Rubber carbon black means furnace-process and thermal-process carbon black used for the manufacture of rubber.

Columbian means Columbian Enterprises, Inc., as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of its parents, divisions, subsidiaries, successors and assigns.

Rubber carbon black production capacity means the practical annual productive capacity in the United States of any production units, including both units currently in operation and existing units that could be put into operation with or without time delay or additional investment. The term shall not include units dedicated to the manufacture of carbon black for industrial end uses. The term shall include reactor vessels, including associated nozzles and reaction chambers, and associated baghouses and dryers, but shall not include other equipment.

I.

It is ordered, That for a period of five (5) years from either (a) the date this order becomes final or (b) February 15, 1985, whichever is earlier, Columbian shall not acquire, directly or indirectly, without the prior approval of the Commission, any part of the United States rubber carbon black business of any other person or corporation, whether represented by securities or assets, other than products or securities obtained in the regular course of business, if as a result of such acquisition Columbian would cumulatively increase its United States rubber carbon black production capacity by more than 130 million pounds.

II.

It is further ordered, That, while Paragraph I of this order is effective, Columbian shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment of substantially all assets, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries in the United States, that may affect compliance obligations arising out of this order.

III.

It is further ordered, That (a) if the Commission dismisses its complaint in *Bass Brothers Enterprises, Inc., et al.,* Docket No. 9178 [107 F.T.C. __ (1986)], with respect to Respondents Bass Brothers Enterprises, Inc. or Sid Richardson Carbon & Gasoline Co., (hereinafter collectively "Richardson") then this order shall, upon application of Respondent, be dismissed, unless the Commission determines that the grounds for the dismissal of Richardson are a material change in the market for rubber carbon black or in the competitive significance of Richardson in that market, and the Commission finds that said grounds are not applicable to Columbian; (b) if the Commission proceeding in *Bass Brothers Enterprises, Inc., et al.* terminates with an order that does not require prior Commission approval of future acquisitions by Richardson or requires prior Commission approval for a period shorter than that set forth in Paragraph I above, then this order shall, upon application of Respondent, be modified to impose only such lesser restriction on Respondent herein; and (c) if the Commission proceeding in *Bass Brothers Enterprises, Inc., et al.* terminates with an order that permits without prior Commission approval acquisitions that would cumulatively increase Richardson's United States rubber carbon black capacity by more than 130 million pounds (including any permitted acquisition of capacity by Richardson from Ashland,) then this order shall, upon application of Respondent, be modified to permit Respondent herein to acquire United States rubber black production capacity in the same amount.

IV.

It is further ordered, That if Columbian shall make an acquisition of United States rubber carbon black production capacity permitted under this order while Paragraph I of this order is effective, it shall file with the Commission a written report describing such acquisition.

Commissioner Calvani dissented.

IN THE MATTER OF

OKLAHOMA OPTOMETRIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9191. Complaint, Feb. 28, 1985—Decision, Nov. 19, 1985

This consent order requires the Oklahoma Optometric Association, among other things, to cease prohibiting any member optometrist from: affiliating with or operating franchises; operating branch offices; or truthfully advertising the prices, terms and availability of optometric services or optical goods.

Appearances

For the Commission: *Toby G. Singer, Raymond L. Randall* and *Alan R. Soudakoff.*

For the respondent: *Daniel J. Gamino, Daniel J. Gamino & Associates, P.C.,* Oklahoma City, Okla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Oklahoma Optometric Association is a corporation formed pursuant to the laws of the State of Oklahoma, with its mailing address at 4545 N. Lincoln Blvd., Suite 173, Oklahoma City, Oklahoma.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of optometrists who practice in Oklahoma and the profession of optometry in Oklahoma. Respondent has approximately 300 members, constituting approximately ninety percent of the practicing optometrists in Oklahoma. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

PAR. 3. Respondent's members are engaged in the business of pro-

viding optometric care or services for a fee. Some are also engaged in the sale of optical goods and devices. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves.

PAR. 4. In the conduct of their business, respondent's members: receive substantial sums of money, which monies flow across state lines, from the federal government and from private insurers for rendering optometric services; prescribe and sell optical goods and devices that are shipped in interstate commerce; receive and treat patients from other states; and use supplies and equipment that are shipped across state lines. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third parties who pay for optometric services, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

PAR. 5. The practice of optometry is defined by Oklahoma law as the science and art of examining the human eye and measurement of the powers of vision by the employment of any means, including, among other things, diagnosis of conditions of the human eye, the employment of visual training and orthoptics, and the correcting and relief of ocular abnormalities by means including prescribing and adaption of lenses, contact lenses, and eyeglasses. Oklahoma law also provides that a lay person may, pursuant to a written prescription of a licensed optometrist or physician, adapt, provide, and sell optical goods and devices, including lenses and eyeglasses, without a license to practice optometry.

PAR. 6. In Oklahoma, most optometric services have traditionally been provided by private optometrists practicing from a single office location. Most of these optometrists have also sold optical goods and devices such as prescription eyeglass lenses, eyeglass frames, contact lenses, and accompanying paraphernalia from a separate room or area within their office. Most have engaged in little or no advertising of competitive aspects of their services.

PAR. 7. Some optometrists do not sell optical goods and devices in their professional offices. These optometrists either have chosen not to sell such goods or have chosen to sell them from a location that is separate and distinct from their professional office but usually located near it. This method of selling, used by a small number of optometrists in Oklahoma, is often conducted under a franchise arrangement with a national seller of optical goods and devices. For the purposes of this complaint, "franchise arrangement" shall mean an arrangement to market and sell optical goods and devices under the trade name of a franchisor from a location other than a licensed optome-

trist's professional office where optometric services are provided. The franchised retail optical store will, like other optical goods sellers, sell to any person who brings in a valid prescription or request for available optical goods and devices.

PAR. 8. For various reasons, including their scale of operation, franchised retail optical stores are often able to provide quality optical goods and devices at prices lower than those generally charged for comparable items by independent optometrists or opticians in the local area.

PAR. 9. Branch offices permit an optometrist to provide optometric services from more than one location. Where branch offices exist, optometrists can increase consumer access to optometric care, and operating efficiencies can be achieved. Optometrists do not have branch offices in Oklahoma.

PAR. 10. In selecting an optometrist, consumers consider factors such as quality of service, price and other terms of sale, reputation, experience, and convenience. Advertising, including comparative advertising and advertising of guarantees and refund policies, enables optometrists to inform consumers about these factors. Such advertising benefits consumers by increasing the information available to them and promoting competition among optometrists.

PAR. 11. Respondent has restrained competition in the delivery of optometric services and the sale of optical goods and devices in Oklahoma by acting as a combination of at least some of its members, or by combining and conspiring with at least some of its members, to restrict the use of franchise and branch office arrangements and to restrict dissemination by optometrists of truthful information to consumers. In particular, respondent has combined or conspired to:

A. Prohibit, restrict, or coerce its members from selling, or offering to sell, optical goods and devices to the public through any franchise arrangement;

B. Prohibit its members from providing optometric services from a separate or branch office; and

C. Restrict its members' ability to engage in certain kinds of truthful advertising, non-deceptive marketing, and dissemination of information to consumers.

PAR. 12. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Declaring that optometrists who are affiliated with a franchise arrangement are engaging in an unethical and objectionable "mode of practice";

B. Summarily suspending from membership optometrists who are

affiliated with a franchise arrangement, despite having no reason to believe that any of these members were engaged in "capping and steering" or any other deceptive practice, and although none of the suspended members has been charged with, or found liable for, any violation of any Oklahoma law with regard to his or her affiliation with the franchise arrangement;

C. Adopting and maintaining a rule prohibiting each member from practicing optometry "in such proximity to a retail optical establishment so as to induce patronage for himself by such location";

D. Adopting and maintaining an ethical rule that prohibits any member from "associating his title with a lay practice," without regard to whether or not such association deceives the public or in any manner degrades or reduces the quality of visual care received by any person;

E. Adopting and maintaining an ethical rule prohibiting its members from operating a separate or branch office;

F. Adopting and maintaining, for the acknowledged purpose of maintaining "professional unity," a rule that declares it unethical for any member to make any representation in such a manner as to "carry the slightest intimation" of possessing qualities superior to other members, which applies even to truthful representations and which operates to prevent an optometrist from engaging in comparative advertising or otherwise representing that he or she has particular skills, experience, or special training in, for example, providing care to pediatric, geriatric, or low-vision patients;

G. Adopting and maintaining an ethical rule requiring that its members "refrain from specific guarantees," which operates, for example, to prevent optometrists from offering to refund the cost of optical goods if a patient is dissatisfied with them;

H. Adopting and maintaining rules requiring its members to refrain from the display of eyeglasses or representations of eyes under any circumstances; and

I. Adopting and maintaining an ethical rule requiring that its members refrain from all criticism of another optometrist.

PAR. 13. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Eleven and Twelve above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

A. Competition in the delivery of optometric services and the sale of optical goods and devices on the basis of price, service, and quality has been frustrated and restrained;

B. Consumers have been deprived of the benefits of truthful infor-

mation about the availability of optometric services and optical goods; and

C. Consumers have been deprived of the potential cost savings, convenience, and efficiency benefits of retail optical franchise arrangements and separate or branch offices in their purchases of optometric services and optical goods and devices.

PAR. 14. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against respondent.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Oklahoma Optometric Association is a corporation organized, existing and transacting business under the laws of the State of Oklahoma, with its office and principal place of business located at 4545 N. Lincoln Blvd., Suite 173, Oklahoma City, Oklahoma.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. *Respondent* means the Oklahoma Optometric Association, its directors, trustees, councils, committees, officers, representatives, delegates, agents, employees, successors, or assigns.

B. *Optometrist* means any individual licensed to engage in the practice of optometry in the State of Oklahoma.

C. *Franchise Arrangement* means any arrangement to market and sell optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional office where optometric services are provided.

II.

It is ordered, That Respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall cease and desist from:

A. Prohibiting, restricting, restraining, or coercing any optometrist from entering into or maintaining a franchise arrangement, or from affiliating with an optometrist who has done so or is doing so, through any means, including, but not limited to:

1. Declaring it to be an unethical or objectionable practice or mode of practice for any optometrist to enter into or maintain a franchise arrangement, or to affiliate with an optometrist who has done so or is doing so;

2. Expelling, excluding, suspending, or threatening to expel, exclude, or suspend, any optometrist from membership for entering into or maintaining a franchise arrangement, or for affiliating with an optometrist who has done so or is doing so;

3. Adopting or maintaining a rule, policy, guideline, or ethical standard that prohibits optometrists from practicing optometry in proximity to a retail optical establishment; and

4. Adopting or maintaining any rule, policy, guideline, or ethical standard that prohibits any optometrist from associating his or her title with a lay practice;

B. Prohibiting, restricting, restraining, or coercing any optometrist from establishing or maintaining any separate or branch office; and

C. Restricting, regulating, impeding, declaring unethical, interfering with, restraining, or advising against the advertising, publishing, or disseminating by any person of the prices, terms, availability, characteristics, or conditions of sale of optometric services or optical goods and devices that are offered for sale or made available by an optometrist or by any organization with which an optometrist is affiliated through any means, including, but not limited to, the adopting or maintaining of any rule or policy that prohibits any member from:

1. Representing that he or she has particular or special qualities, including, but not limited to, those that may be the result of special training, skills, or experience;
2. Engaging in comparative advertising, including, but not limited to, advertising that could be construed as criticizing another optometrist;
3. Displaying eyeglasses, representations of eyes, or other optical goods; or
4. Offering guarantees, including, but not limited to, offering to refund the cost of optical goods if a patient is dissatisfied with them or offering to match a competitor's price for the same goods.

Provided, that nothing contained in this part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That Respondent shall cease and desist from:

A. Taking any action against a person alleged to have violated any rule, policy, guideline, or ethical standard without first providing such person with written notice of any such allegation, and without providing such person a reasonable opportunity to respond. The notice required by this part shall, at a minimum, clearly specify the rule, policy, guideline, or ethical standard alleged to have been violated, the specific conduct that is alleged to have violated the rule, policy, guideline, or ethical standard, and the reasons the conduct is alleged to have violated the rule or ethical standard; and

B. Failing to maintain for five (5) years following the taking of any action referred to in this part, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

IV.

It is further ordered, That this order shall not be construed to prevent Respondent from:

A. Exercising rights guaranteed against infringement by the First Amendment of the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding; or

B. Reporting to appropriate governmental authorities any act or practice that it in good faith believes is a violation of federal or state laws or regulations, along with the basis for such belief.

V.

It is further ordered, That Respondent shall:

A. Within sixty (60) days after this order becomes final, send by first-class mail the letter attached hereto as Attachment A, an application for membership, and a copy of this order and the complaint to each optometrist who has been suspended from membership, whether permanently, temporarily, or indefinitely, because of his or her "mode of practice;" offer to reinstate any such optometrist's membership; and if any optometrist so desires, reinstate such membership within thirty (30) days after the application is returned;

B. Within sixty (60) days after this order becomes final, send by first-class mail the letter attached hereto as Attachment B to every optometrist who is licensed to practice in the State of Oklahoma;

C. For a period of seven (7) years after this order becomes final, provide each applicant for membership in Respondent Oklahoma Optometric Association with a copy of this order and the complaint;

D. Within sixty (60) days after this order becomes final, publish a copy of this order and the complaint in "Oklahoma OD," the Respondent's newsletter, or in any successor publication, with the same prominence as regularly published feature articles;

E. Within ninety (90) days after this order becomes final, remove from its Code of Ethics, Rules of Practice, Constitution, bylaws, and any other existing policy statement or guideline of Respondent, any

provision, interpretation or policy statement that is inconsistent with Part II of this order, or amend any such inconsistency in such a manner as to eliminate the inconsistency so that the amended language does not violate the prohibitions contained in this order, and, within one hundred and twenty (120) days after this order becomes final, publish in the "Oklahoma OD," or in any successor publication, notice of the removal or amendment of any such provision, interpretation, or policy statement;

F. Within one hundred and twenty (120) days after this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order;

G. For a period of seven (7) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including, but not limited to, the rendering of any advice or interpretation with respect to any advertising or franchise arrangement involving any optometrist; and

H. Within one (1) year after this order becomes final, and annually thereafter for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with any activity covered by Part II of this order, including, but not limited to, any advice or interpretation rendered with respect to any advertising or franchise arrangement involving any optometrist.

VI.

It is further ordered, That Respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution or reorganization resulting in the emergence of a successor corporation, association, or other entity or any other change in the Respondent which may affect compliance obligations arising out of this order.

ATTACHMENT A

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) entered by the Federal Trade Commission. Under the terms of this Order, the Oklahoma Optometric Association has agreed that we will not prevent or impede any optometrist from: entering into or operating a franchise arrangement for the sale of optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional

office, or affiliating with an optometrist who has done so; operating a separate or branch office; or engaging in any form of truthful, non-deceptive advertising.

The Consent Order provides that we may not declare it to be an unethical or objectionable mode of practice for an optometrist to enter into or operate a franchise arrangement, or to affiliate with an optometrist who has done so. In addition, we may not expel, exclude, or suspend an optometrist for entering into, operating, or affiliating with such an arrangement. The Consent Order also provides that we may not prohibit or restrict optometrists from engaging in any form of advertising, except to the extent that there is reason to believe that such advertising is false or deceptive.

Under the Consent Order, we must amend our Code of Ethics and Rules of Practice to comply with the terms of the Order. In addition, if we take action against a person alleged to have violated any of our rules or ethical standards, we must provide that person with written notice of the specific allegations and a reasonable opportunity to respond to them.

Accordingly, you have a right to reinstatement of your membership in the Oklahoma Optometric Association. If you wish to reinstate your membership, please fill out the enclosed application form and return it to the Association.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Oklahoma Optometric
Association

ATTACHMENT B

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) entered by the Federal Trade Commission. Under the terms of this Order, the Oklahoma Optometric Association has agreed that we will not prevent or impede any optometrist from: entering into or affiliating with a franchise arrangement for the sale of optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional office, or affiliating with an optometrist who has done so; operating a separate or branch office; or engaging in any form of truthful, non-deceptive advertising.

The Consent Order provides that we may not declare it to be an unethical or objectionable mode of practice for an optometrist to enter into or operate a franchise arrangement or to affiliate with an optometrist who has done so. In addition, we may not expel, exclude, or suspend an optometrist for entering into, operating, or affiliating with such an arrangement. The Consent Order also provides that we may not prohibit or restrict optometrists from operating a branch office, and that we may not restrict optometrists from engaging in advertising, except to the extent that there is reason to believe that such advertising is false or deceptive.

Under the Consent Order, we must amend our Code of Ethics and Rules of Practice to comply with the terms of the Order. In addition, if we take action against a person alleged to have violated any of our rules or ethical standards we must provide that person with written notice of the specific allegations and a reasonable opportunity to respond to them.

Consequently, membership in the Oklahoma Optometric Association is now open to any optometrist licensed in the State of Oklahoma, regardless of any affiliation with

a franchisor or franchisee of optical goods and devices, or the structure or location of his or her practice, or the optometrist's decision to engage in truthful advertising.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Oklahoma Optometric Association

IN THE MATTER OF

CHESEBROUGH-POND'S INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-602. Consent Order, Sept. 25, 1963—Modifying Order, Nov. 25, 1985

The Federal Trade Commission has modified a 1963 consent order issued against the New York City-based manufacturer and marketer of Vaseline petroleum jelly (63 F.T.C. 927) The modified order deletes provisions prohibiting the company from claiming that Vaseline provides a protective barrier to the skin and is effective for the relief of itching, and allows respondent to make limited claims about the product's beneficial effects, provided respondent has competent and reliable scientific evidence to support its claims. These modifications were granted based on reports from the Food and Drug Administration's over-the-counter drug review program. The modified order also allows respondent to compare Vaseline's effectiveness to that of other products, provided competent and reliable scientific evidence is available.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On April 11, 1985, Chesebrough-Pond's Inc. ("Petitioner") filed a request to reopen and to set aside or modify the consent order entered against it by the Commission on September 25, 1963, in Docket No. C-602 (63 F.T.C. 927). The order prohibits Petitioner from making certain usage and effectiveness claims with respect to the advertising of its over-the-counter drug product, "Vaseline" petroleum jelly.[1] The request to reopen and to set aside or modify the consent order was placed on the public record on April 23, 1985, and a press release regarding the request was issued on the same date. The public comment period ended May 23, 1985. Comments were filed by four individual consumers during that period.[2] The deadline to rule on Petitioner's request was subsequently extended to November 25, 1985.

The order requires Petitioner to cease making a variety of advertising claims with respect to the therapeutic and protective qualities of "Vaseline." The order contains twelve specific prohibitions relating

[1] "Vaseline" petroleum jelly is the product trade name. It is composed mostly of petrolatum, a purified mixture of semi-solid hydrocarbons derived from petroleum. "Vaseline" contains both white petrolatum and yellow petrolatum, which are essentially identical except for color. The terms "Vaseline", "petrolatum", and "product" are used interchangeably throughout this Decision and Order.

[2] All four commenters expressed that they have used the product for a number of years and have used it to treat minor burns, cuts, and scratches. Two of the commenters stated that they have used the product as a skin softener. One commenter stated that she has used the product on heat rash, as a preventative for diaper rash, and as a deodorant.

to the following types of claims: infections; skin injuries; a protective barrier; diaper rash; cradle cap; advertising slogans; and escape of tissue fluids.

Petitioner sets forth several arguments as justification for its request. First, it asserts that the Food and Drug Administration's (F.D.A.) over-the-counter drug review program has resulted in changed conditions of law and fact that require the order to be set aside or modified to allow those claims which the F.D.A. review program has substantiated. Second, Petitioner asserts that the order is no longer necessary or appropriate to protect consumers and thus should be set aside in its entirety. Finally, Petitioner asserts that the order should be modified to allow it to make any claim for which there is a reasonable basis.

Since the order's entry some twenty-two years ago, the F.D.A. has undertaken a comprehensive review evaluating the safety and effectiveness of the ingredients in over-the-counter drug products such as "Vaseline". Petitioner submits that several F.D.A. Advisory Review Panels have concluded that petrolatum, the principal ingredient in "Vaseline", is effective for claims prohibited by the order. It is Petitioner's position that the findings and conclusions of these panels now provide adequate substantiation for these prohibited claims which justifies setting aside these prohibitions.

As Petitioner points out, the Commission has allowed the conclusions and recommendations of F.D.A. Advisory Review Panels to demonstrate adequate substantiation for performance claims. In prior decisions, the Commission has held that F.D.A. final monographs[3] may be relied upon to substantiate performance claims for over-the-counter drug products, *AHC Pharmacal, Inc.*, 101 F.T.C. 40 (1983); *Thompson Medical Co.*, Docket No. 9149, Slip. op. at 80 (November 23, 1984) [104 F.T.C. at 826]. In addition, the Commission has held that F.D.A. preliminary documents subject to revision, such as tentative final monographs, are also presumptively reliable for substantiation. *American Home Products Corp.*, 98 F.T.C. 136 (1981) at 368. We have reviewed the monographs relied on by Petitioner and compared the findings and conclusions of the various panels reviewing petrolatum with the claims prohibited by the order. Based on this review we conclude that the findings and conclusions do substantiate two of the claims now prohibited by the order.

Paragraph 1.(b) of the order prohibits Petitioner from making any claim that "Vaseline" provides a protective barrier to the skin unless such claim is limited to the water repellant effect of a continuous film

[3] A monograph sets out the findings and conclusions of the F.D.A. Advisory Review Panels. A monograph can be published as a proposed monograph, a tentative final monograph, and a final monograph depending on the stage of the review process.

of the product. The Skin Protectant Panel conclusively states that petrolatum is a skin protectant. It defines a skin protectant as "any agent that isolates the exposed skin or mucous membrane surface from any harmful or annoying stimuli." 43 FR. 34630 (August 4, 1978). The panel further concludes that "protectants act as mechanical barriers that physically alter the superficial wound environment by excluding air, removing wetness, prevent drying and protecting from intertriginous contact." *Id.* In addition, the F.D.A. has published a tentative final monograph for skin protectants which determined that petrolatum "protects injured or exposed skin or mucous membrane surfaces from harmful or annoying stimuli." 48 FR. 6823 (February 15, 1983). We conclude that these findings and conclusions establish that petrolatum provides a protective barrier to skin without limitation to its water repellant effect, and accordingly decide that this paragraph of the order shall be set aside.

Paragraph 1.(c)(5) of the order specifically prohibits Petitioner from claiming that "Vaseline" will have any effect upon itching unless limited to itching from sunburned, dry, chapped, chafed or scraped skin or other minor skin injuries. The Skin Protectant Panel did find that petrolatum is effective for the treatment of itching associated with dry skin conditions. This panel found the product useful as a soothing topical lubricant. The Hemorrhoidal Panel went even further. It concluded that petrolatum is effective for (1) relief of itching or other anorectal discomfort; (2) for the temporary relief of anorectal itching; (3) for the temporary relief of itching associated with hemorrhoids and other anorectal disorders; and (4) in forming a protective coating over inflamed tissue that can relieve itching. 45 FR. 35628 (May 27, 1980). We conclude that these findings and conclusions substantiate that petrolatum relieves itching other than itching associated with sunburned, dry, chapped, chafed or scraped skin, and accordingly decide that the limitation on itching claims is inappropriate and shall set aside this paragraph of the order.

The findings and conclusions of the F.D.A. Advisory Review Panels fall short of providing adequate substantiation justifying the setting aside of the proscribed claims relating to burns (1.(c)(1)), scrapes (1.(c)(1)), scratches (1.(c)(1)), abrasions (1.(c)(1)), scabbed skin (1.(c)(2)), diaper rash (1.(c)(3)), cradle cap (1.(c)(4)), and escape of tissue fluids (1.(g)). These same findings and conclusions do not address other claims that are proscribed by the order, namely claims relating to the prevention of infection (1.(a)), treatment of cuts or open wounds, (1.(d)), or advertising slogans (1.(e)). Since the findings and conclusions of the F.D.A. panels are the only evidence Petitioner has submitted to support its request, there is nothing before us to support any action

with respect to provisions 1.(a), 1.(d) and 1.(e). Consequently, these provisions of the order will remain unchanged.

Petitioner next argues that the order is no longer necessary or appropriate to protect consumers. In essence, Petitioner argues that most of the proscribed claims have been addressed by the F.D.A. Advisory Review Panels and their findings and conclusions are in conflict with a number of the provisions of the order. In addition, Petitioner contends that combined with the ongoing F.D.A. review of over-the-counter drugs, the age of the order renders it obsolete.

The Federal Trade Commission Act, 15 U.S.C. 45(b) requires that an order be modified or set aside upon a satisfactory showing that changed conditions of law or fact requires such modification or setting aside. The Commission's rules implementing this statutory mandate amplify on this by stating that an order should be set aside or modified if "the public interest so requires." Rule 2.51(b) Commission's Rules of Practice, 16 C.F.R. 2.51. When an order no longer serves any useful purpose and impedes truthful advertising, it is clear under the statute and the rules that it should be set aside. However, where the provisions of an order are not inconsistent with the F.D.A. and its advisory review panels, such an order retains its usefulness irrespective of its age. Other than the provisions of the order we have decided should be set aside, several provisions, namely those relating to burns (1.(c)(1)), scrapes (1.(c)(1)), scratches (1.(c)(1)), abrasions (1.(c)(1)), scabbed skin (1.(c)(2)), diaper rash (1.(c)(3)), cradle cap (1.(c)(4)), and escape of tissue fluids (1.(g)), are not wholly consistent with the findings and conclusions of the advisory review panels. While these findings and conclusions do not justify setting aside the proscribed claims, they do justify some claims of a similar nature which the current order prohibits because of the absolute nature of these prohibitions. For example, the panels found that petrolatum is safe and effective in the temporary relief of minor skin irritations; soothes minor skin irritations; gives comfort to minor skin irritations; affords temporary protection of minor skin injuries; aids in the prevention of diaper rash; affords protection against wetness that causes diaper rash; softens skin; and prevents water loss from stratum corneum. Accordingly, we have concluded that these claims will be subjected to a reasonable basis standard, as requested by Petitioner as alternative relief, as being in the public interest.

This is appropriate relief under Commission policy. The Commission has long held that an advertiser is not required to demonstrate the absolute truth of a particular claim, only a reasonable basis for making it. Bureau of Consumer Protection, F.T.C. *Advertising Substantiation Program, Analysis of Public Comments and Recommended Changes* (July 23, 1984). This is consistent with our previous decisions

in *AHC Pharmacal, Inc., supra,* where we modified an order to permit AHC to rely on F.D.A. panel recommendations as a reasonable basis for substantiating superiority claims. *See, also, Thompson Medical Co., supra,* and *Ogilvy & Mather International Corp.,* 101 F.T.C. 1 (1983).

As noted above, the findings and conclusions of the F.D.A. Advisory Review Panels do justify the use of some claims of a similar nature to those prohibited under the order, namely qualified claims with respect to burns, scrapes, scratches, abrasions, scabbed skin, diaper rash, cradle cap and escape of tissue fluids. Petitioner does possess a reasonable basis for making these similar, albeit qualified claims but can not do so under the current order. Because of this dichotomy, we will modify the order to allow any such claims that can be supported by a reasonable basis consisting of competent and reliable scientific evidence. *See e.g., Sterling Drug, Inc.,* 101 F.T.C. 375 (1983). Although Petitioner has only presented the findings and conclusions of the various F.D.A. panels in support of its request, we do recognize that competent and reliable evidence consisting of tests, analyses, research, studies or other materials based on the expertise of professionals in the relevant area may also provide a reasonable basis to substantiate some of the claims in issue here. Consequently, either the findings and conclusions of the F.D.A. panels or competent and reliable scientific evidence may be used by Petitioner as a reasonable basis to substantiate such advertising claims, if such evidence does in fact support such claims. In addition, although it is not clear that the advisory review panels addressed this issue, we will also accord the comparative soothing and softening claims similar treatment in accord with our policy to encourage comparative claims where justified.

Because of the nature of the modifications granted hereby, it has been necessary to restructure the order. All reference to the two previously prohibited claims which we have decided to set aside will be deleted from the modified order. Part I of the modified order prohibits those claims for which no evidence justifying their vacation has been presented and will remain unchanged from the original order. Part II of the modified order prohibits the use of certain other claims unless substantiated by competent and reliable scientific evidence establishing a reasonable basis or which are supported by the findings and conclusions of the various F.D.A. Advisory Review Panels. The final sentence in Part II of the modified order is intended to clarify the fact that current versions of the F.D.A. Advisory Review Panels' findings and conclusions may be used as a reasonable basis for substantiating claims, unless and until such findings and conclusions are modified. Part III of the modified order prohibits the dissemination of

advertising of any representations or claims not allowed under the modified order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued September 25, 1963 in Docket No. C–602 is hereby modified to read as follows:

ORDER

I.

It is ordered, That respondent Chesebrough-Pond's Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of "Vaseline" petroleum jelly (White Petrolatum, U.S.P. or Yellow Petrolatum, N.F.), or any other preparation of similar composition or possessing substantially similar properties, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or indirectly:

(a) That respondent's product is of value in preventing infection;

(b) That respondent's product is of any benefit in the treatment of cuts or open wounds; or

(c) That respondent's product is a substitute for a "First Aid Kit in a Jar" unless such slogan is used in direct connection with or in close proximity to illustrations or descriptions of the unprohibited first aid uses of the product.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of "Vaseline" petroleum jelly (White Petrolatum, U.S.P. or Yellow Petrolatum, N.F.), or any other preparation of similar composition or possessing substantially similar properties, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or indirectly:

(a) That respondent's product is of any benefit in curing, or in promoting or accelerating the healing of, burns, scrapes, scratches, abrasions, scabbed skin, diaper rash or cradle cap;

(b) That respondent's product will soothe and soften the skin better than competitors' products having substantially similar properties; or

(c) That respondent's product prevents the escape of tissue fluids from the skin;

Unless at the time that such representation is made respondent possesses and relies upon a reasonable basis consisting of reliable and competent evidence that substantiates the representation. Reliable and competent evidence establishing a reasonable basis for such representation shall consist of:

(a) Tests, analyses, research, studies or any other materials based on the expertise of professionals in the relevant area, provided such tests, analyses, research, studies or other materials are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results; or

(b) The findings and conclusions of the Food and Drug Administration (F.D.A.) or an F.D.A. Advisory Review Panel as published in the Federal Register to describe such findings and conclusions, unless and until any such findings or conclusions are modified.

Nothing herein shall be deemed to create or support an inference that evidence in existence at the time this Modified Order is issued does not constitute a reasonable basis for any representation subject to this paragraph.

IN THE MATTER OF

THE KROGER COMPANY

Docket 9102. Interlocutory Order, Nov. 26, 1985.

ORDER REVOKING *IN CAMERA* TREATMENT AND PLACING DOCUMENTS ON THE PUBLIC RECORD

During the administrative hearing in this matter, certain documents and testimony received *in camera* treatment. On July 10, 1979, the Kroger Company filed a motion to revoke the *in camera* designation and to place on the public record the entire Initial Decision issued by the Administrative Law Judge and all the evidence and argument it offered during the proceeding. The Commission, in entering its final decision and order, 98 F.T.C. 639 (1981), *modified,* 100 F.T.C. 573 (1982), did not address respondent's pending motion that the *in camera* status of these materials be revoked. Respondent now asks the Commission to withdraw from *in camera* status and place on the public record certain internal documents admitted into evidence in the proceeding.

The exhibits accorded *in camera* treatment consist of documents provided by respondent and internal agency materials. Kroger consents to the public disclosure of its own materials.[1] The agency records were compiled in investigations that closed more than three years ago. We have determined that most of the agency materials made part of the *in camera* record no longer warrant confidential treatment and should be made part of the public record. Several exhibits, however, reflect the predecisional views of individual Commissioners and advice from the General Counsel. These sensitive deliberative materials are protected from public disclosure, *see NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1972), and the Commission believes there is good cause to preserve their *in camera* status. Accordingly, the Commission declines to revoke the *in camera* status of these documents.[2]

It is ordered, That the *in camera* treatment of exhibits received in evidence and of other documents in the record relating to those exhibits be eliminated in accordance with this order.

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[1] Letter from N. Diamond, counsel for Kroger, dated May 14, 1985.

[2] In its letter dated May 14, 1985, Kroger's counsel advised that respondent was specifically interested in five exhibits, RX221, RX222, RX240, RX241 and RX1003. Portions of RX222 and RX1003 set forth the predecisional views of individual Commissioners and will remain nonpublic. The remaining portions of these exhibits as well as RX221, RX240 and RX241 will be publicly disclosed.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Nov. 27, 1985

ORDER

Administrative Law Judge Timony has certified, pursuant to Rules 3.22(a) and 3.15(a)(1), complaint counsel's motion to dismiss the complaint as to respondent Warren E. Avis. It appears that Mr. Avis has had no meaningful connection with the conduct at issue in this case. Although Mr. Avis is an absentee owner of respondent Avis Ford, Inc., he did not act as Chairman and Treasurer of the firm, as complaint counsel previously believed. Accordingly, it is not in the public interest to continue these proceedings as to Mr. Avis. The motion is granted.

It is so ordered.

IN THE MATTER OF

LARRY BROG

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3174. Complaint, Dec. 3, 1985—Decision, Dec. 3, 1985

This consent order requires a former chief executive officer of a Salt Lake City, Utah manufacturer and distributor of a dry milk substitute, among other things, to cease making any representations concerning the health benefits or expected shelf life for "Meadow Fresh White", a powdered, dairy-based milk substitute, or other food products, without reliable and competent substantiation. Also, respondent is prohibited from excluding some distributors in computing "average" distributor earnings without proper disclosures concerning the method of computation.

Appearances

For the Commission: *Lawrence M. Hodapp.*

For the respondents: *Cheryl I. Jolley, Anderson & Holland,* Salt Lake City, Utah.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Larry Brog, individually and as a former officer of Meadow Fresh Farms, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Meadow Fresh Farms, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah with its office and principal place of business located in Salt Lake City, Utah.

Respondent Larry Brog was formerly Chief Executive Officer of said corporation. He, among others, formulated, directed and controlled the acts and practices of said corporation, including the acts and practices hereinafter set forth. His address was the same as that of said corporation.

PAR. 2. Respondent for some time in the past has been engaged in

the manufacture, offering for sale, and sale of food products, including Meadow Fresh, a powdered, dairy-based drink, through a multilevel business opportunity.

PAR. 3. Respondent has caused to be prepared, published and disseminated advertising and promotional material, including, but not limited to, the promotional material referred to herein, to promote the sale of Meadow Fresh and membership in the Meadow Fresh multilevel business opportunity.

PAR. 4. Respondent has operated in various States of the United States and in the District of Columbia. Respondent's manufacturing, offering for sale, sale, and distribution of food products, including Meadow Fresh, constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of his business, respondent has disseminated and caused the dissemination of advertisements and promotional material for food products, including Meadow Fresh, and for a multilevel business opportunity involving the sale of such food products, by various means in or affecting commerce, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 6. Typical statements in said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the following:

(A) Contains over twenty times less "XO"* than the whole version of the other product. *"XO" is xanthine oxidase, a major contributor to cardiovascular problems.
(B) Meadow Fresh has an expected dry shelf life of 5 to 10 years.

PAR. 7. Through the use of the statements referred to in Paragraphs Six (A) and Six (B), and other statements contained in other advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

(A) The use of Meadow Fresh is associated with a reduction in the incidence of cardiovascular disease due to reduced levels of xanthine oxidase.

(B) Xanthine oxidase is a major contributor to cardiovascular problems.

(C) Meadow Fresh has an expected storage life of 5 to 10 years under reasonable storage conditions.

PAR. 8. Through the use of the statements referred to in Paragraphs Six (A) and Six (B), and other statements contained in other advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that at the

time of the initial dissemination of the statements and of each subsequent dissemination, he possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Seven (A) through Seven (C).

PAR. 9. In truth and in fact, at no time has respondent possessed and relied upon a reasonable basis for making the representations set forth in Paragraphs Seven (A) through Seven (C). Therefore, respondent's representation as set forth in Paragraph Eight was and is false and misleading.

PAR. 10. In the course and conduct of his business, respondent has disseminated, as previously described, promotional flipcharts upon which the current average monthly income of each level in the distributor hierarchy is to be entered. (A copy of this flipchart is attached to this complaint as Exhibit A.) These flipcharts are headed "CURRENT AVERAGE INCOMES FOR EACH BONUS LEVEL" and contain blanks following the terms "ADVISOR. . . .; COORDINATOR. . . .; MANAGER. . . .; AMBASSADOR. . . ." for income figures to be entered. These flipcharts have represented, directly or by implication, that the income figures shown thereon reflect an average which is computed by taking into account the total number of distributors who have advanced to the specified bonus level and the amount of money earned by each of them during the month in question.

PAR. 11. In truth and in fact, the income figures shown on the flipcharts do not reflect an average which is computed by taking into account the total number of distributors who have advanced to the specified bonus level and the amount of money earned by each of them during the month in question. Respondent provides distributors with monthly income figures for use on the flipchart which are computed by taking into account only those distributors who earn some income during the month in question, and the total amount of money earned by them. Because the large majority of distributors earn no income during a given month, this manner of computation results in average income figures which are substantially larger than would be the case if the figures were computed by the method set forth in Paragraph Ten. Therefore, respondent's representation as set forth in Paragraph Ten is false and misleading.

PAR. 12. The use by respondent of the aforesaid false, misleading and unfair statements and representations and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid false, misleading and unfair statements and representations have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations were and are true and complete and to induce such persons to purchase Meadow Fresh and

become Meadow Fresh Farm distributors by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

CURRENT AVERAGE INCOMES FOR EACH BONUS LEVEL

ADVISOR ..... _____

COORDINATOR ..... _____

MANAGER ..... _____

AMBASSADOR ..... _____

NOTE: The amounts listed here only reflect rebates, overrides and bonuses, not retail profits.

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Contributing Author: Alan Sargent

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Meadow Fresh Farms, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its office and principal place of business located at 391 South Orange Street, in Salt Lake City, State of Utah.

Proposed respondent Larry Brog is a former officer of said corporation. He, among others, formulated, directed and controlled the policies, acts and practices of said corporation and his address was the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Larry Brog, individually and as a former officer of Meadow Fresh Farms, Inc., and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of a powdered, dairy-based drink called "Meadow Fresh" or any other food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, unless at the time of such representation respondent possesses and relies upon reliable and competent scientific evidence that substantiates any such representation, (a) any benefit to health to be derived from using any such product, (b) any nutritional or other health related attribute of such product, or (c) any expected shelf life of such product.

Reliable and competent shall mean for purposes of this order those tests, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

II

It is further ordered, That respondent Larry Brog, individually and as a former officer of Meadow Fresh Farms, Inc., and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing as an "average," directly or by implication, any computation of income levels, earnings, sales or other payments received by distributors as a whole or by a specified distributor category which is based on less than all distributors in the stated category, unless the fact that some distributors are excluded and the basis for any such exclusion are clearly and prominently disclosed in close proximity to such representation.

Distributor as used in this order shall refer to any person, partnership or corporation which is granted the right to offer, sell or distribute goods or services manufactured, processed, distributed, offered or

sold by respondent or to recruit other persons, partnerships or corporations to be distributors of respondent's goods or services.

III

It is further ordered, That respondent shall, for at least three years after the date the representation is last disseminated, maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials relied upon to substantiate any representation covered by this order; and
2. All test reports, studies, surveys, or demonstrations in his possession or control, or of which he has knowledge, that contradict any representation covered by this order.

IV

It is further ordered, That respondent shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of four years from the date of service of this order, respondent shall promptly notify the Commission of each affiliation with a new business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to all distributors of products manufactured or marketed by respondent.

VI

It is further ordered, That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

WEIDER HEALTH AND FITNESS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9182. Complaint, July 26, 1984—Decision, Dec. 11, 1985

This consent order requires a Woodland Hills, Calif. manufacturer and distributor of nutrient supplements and three corporate officers, among other things, to make refunds to purchasers of "Anabolic Mega-Pak" or "Dynamic Life Essence." If the refunds total less than $400,000, respondents are required to donate the difference to fund research on the relationship of nutrition to muscle development. Respondents are required to publish notices of the refund offer in two bodybuilding magazines. Additionally, respondents are prohibited from: (1) making unsubstantiated claims that its products promote muscular development, produce human-growth hormone or that its products are unique; and (2) misrepresenting any scientific test, research article, survey or other scientific opinion or data as it applies to their products.

Appearances

For the Commission: *Michael L. Sirota* and *Timothy T. Hughes.*

For the respondents: *Kirkpatrick W. Dilling, Dilling, Dilling & Gronek,* Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that Weider Health and Fitness, Inc., a corporation, and Joseph Weider, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, and that an action by it is in the public interest, issues this complaint and alleges that:

PARAGRAPH 1. Respondent Weider Health and Fitness, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 21100 Erwin Street, Woodland Hills, California.

Respondent Joseph Weider is an officer of the corporate respondent named herein. He has formulated, directed and controlled the acts and practices of the corporation, including all the acts and practices set forth below. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are, and have been engaged in the manufac-

ture, offering for sale, promotion and distribution to the public of the nutrient supplements "Anabolic Mega-Pak" and "Dynamic Life Essence" and other foods, as "food" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including, but not limited to, the advertising and promotional materials referred to herein, to promote the sale of their nutrient supplements and other foods. As advertised, respondents' nutrient supplements and other foods are foods, as "food" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents operate in various States of the United States and in the District of Columbia. Respondents' manufacturing, offering for sale, promoting and distributing of nutrient supplements and other foods, constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, respondents have disseminated and caused the dissemination of advertisements and promotional materials for nutrient supplements and other foods, by various means in or affecting commerce, including *inter alia,* placing advertisements in national magazines distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' nutrient supplements and foods.

PAR. 6. Typical statements in such advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through E. Specifically, these advertisements and promotional materials contain the following statements:

A. In regard to the Anabolic Mega-Pak:

1. It is "scientifically created . . . for the creation of maximum fat-free muscle mass!"

2. It produces "faster-than-ever-before muscle growth."

3. It is "A Natural Steroid Replacement Kit You Can Live With. The only kit on the market scientifically created to replace steroids. . . ."

4. It can "produce gains that approximate, in a physiological way, the muscle-building effect caused by the dangerous drugs it was designed to replace."

5. "Over the course of a few months use, Joe Weider's revolutionary

new discovery could produce gains that approximate those of the most potent anabolic steroids—with virtually no negative side effects."

6. "The most advanced benefit of using Joe Weider's steroid replacement kit is that your muscle growth and development are long-lasting, not temporary like those derived from drugs."

7. It can "stimulate the release of human growth hormone (hGH) from the pituitary gland," "enabling manufacture of more muscle-building protein for solid, lasting muscle tissue."

8. "[A]t great expense and effort Joe Weider assembled the world's most reknowned [sic] nutritional biochemists, exercise physiologists and trainers, all committed to evolve the most effective steroid replacement that experience and science could provide."

B. In regard to "Dynamic Life Essence":

1. Life Essence is superior to "conventional protein sources to muscle up."

2. "Life Essence Builds Bigger Muscles—Faster!"

3. "Life Essence gently activates anabolic activity by coaxing the pituitary gland to secrete greater amounts of growth hormones into the bloodstream."

4. "Life Essence is unlike any other amino acid source in the world. So unique, in fact, that it has a worldwide patent pending."

PAR. 7. Through the use, *inter alia*, of the statements referred to in Paragraph Six (A) through Six (B), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondents have represented, and now represent, directly or by implication that:

A. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will achieve greater muscular development over the course of a few months of a weight training program than a non-user of these products, all other conditions remaining equal.

B. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will achieve at least the muscular development of the non-user of these products, but in a shorter period of time, all other conditions remaining equal.

C. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will achieve results equivalent to those results bodybuilders generally believe are achievable through use of anabolic steroids, *i.e.*, rapid and substantial muscular development.

D. The "Anabolic Mega-Pak" and "Dynamic Life Essence" will stimulate greater than normal production or release of human growth hormone, resulting in greater or faster muscular development.

E. "Dynamic Life Essence" is unlike any other amino acid source in the world, *i.e.*, it is unique.

F. The "Anabolic Mega-Pak" was developed by a team of the world's most renowned nutritional biochemists, exercise physiologists and trainers.

PAR. 8. In truth and in fact:

A. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will not achieve greater muscular development over a course of a few months of a weight training program than a non-user of these products, all other conditions remaining equal.

B. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will not achieve faster muscular development than a non-user of these products, all other conditions remaining equal.

C. A typical user of the "Anabolic Mega-Pak" and "Dynamic Life Essence" will not achieve results equivalent to those results body-builders generally believe are achievable through use of anabolic steroids.

D. The "Anabolic Mega-Pak" and "Dynamic Life Essence" will not stimulate greater than normal production or release of human growth hormone, resulting in greater or faster muscular development.

E. "Dynamic Life Essence" is similar, if not identical, to other amino acid sources in the world, *i.e.*, it is not unique.

F. The "Anabolic Mega-Pak" was not developed by a team of the world's most renowned nutritional biochemists, exercise physiologists and trainers.

Therefore, the representations set forth in Paragraph Seven are false and misleading.

PAR. 9. Through the use, *inter alia*, of the statements referred to in Paragraph Six (A) through Six (B), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondents have represented and now represent, directly or by implication, that at the time of making the representations respondents have possessed and relied upon a reasonable basis for the representations.

PAR. 10. In truth and in fact, at the time of the initial dissemination of those representations and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in Paragraph Nine was, and is, false and misleading.

PAR. 11. Respondents' dissemination of the aforesaid representation and the placement in the hands of others of means and instrumentalities by and through which others may have used the

aforesaid representations have had, and now have, the capacity and tendency to mislead consumers and to induce such consumers to purchase respondents' nutrient supplements and foods.

PAR. 12. The aforesaid acts or practices of respondents, were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

ATTACHMENT A

Take Your Body Beyond Steroids.

Now! The Secret is Out!

JOE WEIDER'S ANABOLIC MEGA-PAK

A Natural Steroid Replacement Kit You Can Live With.

The only kit on the market scientifically created to replace steroids for the creation of maximum fat-free muscle mass! Stimulates release of the growth hormone, strengthens your body, and aids recuperation to assure dynamic, faster-than-ever-before muscle growth. All natural!

Drugs: Blessing And Curse.

Joe Weider, like all great coaches and trainers, recognizes that drugs have been both a blessing and a curse for mankind. He is aware of the potential for drug abuse in sports—the reality of trying to win fame, money or self-gratification at any cost has made drug use a serious problem in many sports. Joe Weider found the problem particularly paradoxical: Bodybuilding is a sport where health, strength, overall fitness, high-energy, muscular development and maintenance are the primary goals; these are virtually unattainable when bodybuilders resort to dangerous pharmaceutical aids such as anabolic steroids.

Joe Weider has spent his life developing the sport of bodybuilding, and he decided to do something about the use of these unhealthy drugs. At stake is the ideal of health and vitality so important to the bodybuilding lifestyle. At best, anabolic steroids are not the wonder drug they have been touted to be. They prematurely age muscle cells, cause testicular shrinkage, impotence, paranoid or extremely aggressive behavior, and a host of serious coronary and liver problems which can prove fatal. Their muscle-building effects are transitory—affecting temporary muscle gains and a false kind of strength that disappears quickly when drug use is discontinued. This kind of "let-down" is both demoralizing and potentially dangerous to the body's delicately balanced endocrine system.

Tackling The Problem.

Joe Weider's message about the great benefits of the bodybuilding lifestyle could not be spread as long as this dangerous trend continued. That's why Joe took action. His directive was clear, he wanted a steroid replacement that worked! No false hopes. No promises that couldn't be kept. Not only would this product work, but work dramatically, as well or better than anabolic steroids but without their inherent dangers. So at great expense and effort Joe Weider assembled the world's most reknowned nutritional biochemists, exercise physiologists and trainers, all committed to evolve the most effective steroid replacement that experience and science could provide. Joe worked them for well over a year to develop a scientific alternative to dangerous and counterproductive drugs.

Joe Weider's Solution.

The result? A combination of natural ingredients so outstanding that its anabolic muscle-building effect could produce gains that approximate, in a physiological way, the muscle-building effect caused by the dangerous drugs it was designed to replace.

"It's Great! Now, I can go into my high-intensity mass building routines without worry or stress."
Tom Platz.

That's not all! Over the course of a few months use, Joe Weider's revolutionary new discovery could produce gains that approximate those of the most potent anabolic steroids—with virtually no negative side effects. Joe's steroid replacement is designed to work naturally, as food does. How? By stimulating the body's own natural anabolic capabilities! The most advanced benefit of using Joe Weider's steroid replacement kit is that your muscle growth and development are long-lasting, not temporary like those derived from drugs.

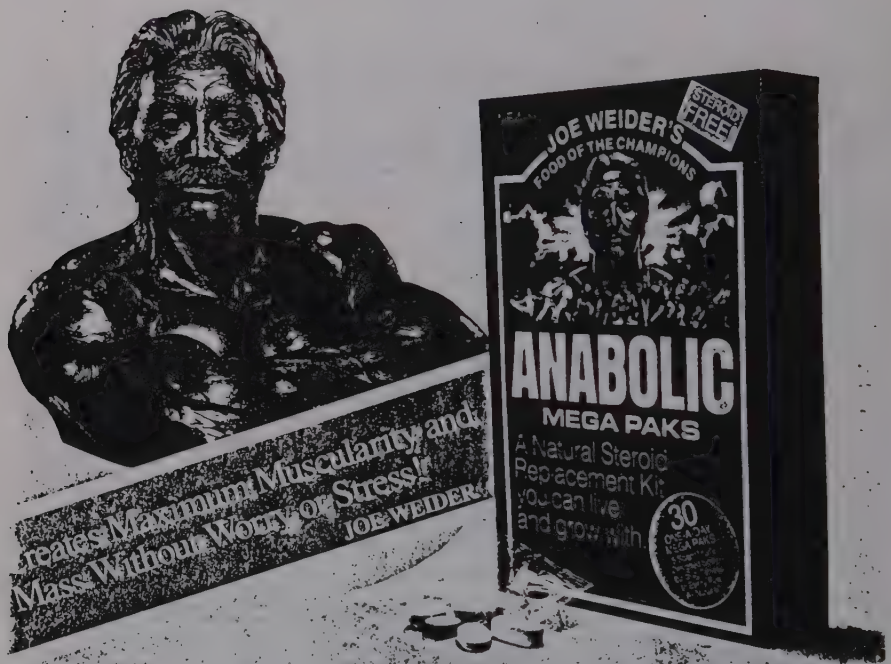
Science At Work For You.

The scientists who helped Joe Weider formulate his steroid replacement paks realized that food supplements alone could not produce an anabolic effect in the human body. But the careful arrangement of ingredients, combined with precise scheduling of their intake could cause a strong anabolic effect similar to that of steroids. Because Joe Weider's ingredients are foods rather than drugs, a lasting anabolic effect could safely be achieved without the harmful side effects generated by drugs. Because nutrients interact on a biochemical level, the Weider scientists had to discover a way to combine these ingredients so they would complement one another to produce a climate within the muscle cells that exceeds their normal anabolic capacity. Furthermore, to register maximum effect this increased anabolic activity should occur in the cells precisely at the time of greatest need. These all-important requirements were met. The result is a food supplement that far exceeds any food ever made in its ability to create a positive anabolic state.

The Weider Secret.

Scientific research into substances that exert an anabolic effect on the human body was thoroughly reviewed to determine the exact combination of nutrients, dosages and intake schedules. Joe Weider found the secret! While others claim that their formulas produce anabolic effects, the truth is that they failed to look beyond their principal ingredients into the complex biochemical interactions that occur *after* the product is ingested! There's the *secret* to Joe Weider's ANABOLIC MEGA-PAK! Weider's *unique* blend of ornithine and arginine is combined with the *exact* compounds necessary for the biochemical transformation of these powerful amino acids.

Scientists have known for years that certain amino acids (ornithine and arginine in particular, after being biochemically transformed to spermine, have the capability to stimulate the release of human growth hormone (hGH) from the pituitary gland. The Weider scientists discovered that certain mineral catalysts are required to ignite and maintain the transformation process until there is enough spermine change to trigger hGH release. Ornithine and arginine change to spermidine and finally spermine by interaction with exact ratios of magnesium, methionine, potassium, calcium and niacinamide. No other product on the market incorporates these important steps.



MUSCLE GROWTH TIMETABLE.

After spermine gently stimulates hGH release, this powerful hormone exerts its anabolic effect on the ribosomes of the muscle cells retaining greater amounts of nitrogen, enabling manufacture of more muscle-building protein for solid, lasting muscle tissue. Moreover fat deposits are mobilized, utilized as fuel for energy, thus causing reductions in bodyfat.

A research shows hGH is more efficiently released during periods of great anabolic activity in the body. Two such periods crucial to muscle growth exist after training, particularly after the intense, vigorous training bodybuilders typically undergo, and during the hours after awakening.

Scientific research also suggests that all the amino acids essential to growth must be present during critical growth periods. The ANABOLIC PAK has this and more! Weider scientists have added LIFE ESSENCE, a unique and powerful blend of free-form amino acids (not egg, milk or soy, and hydrolyzed germ used in liquid preparations), to the ANABOLIC PAK to assure this all-important requirement. The incredible effects of increasing your body's production of hGH also has multi-dimensional effects, synergistically improving human performance. These are functions that no anabolic steroid can provide.

HOW YOU USE IT.

To assure maximum anabolic activity, the Weider ANABOLIC PAK should be used as follows:

Morning: Normal meal supplemented with Joe Weider's "Good Life" MULTIVITAMIN PAK and DYNAMIC MUSCLE BUILDER protein powder fortified with a teaspoon of LIFE ESSENCE (mixed with cup of milk or juice).

Lunch: Normal meal fortified with teaspoon of LIFE ESSENCE (mixed with cup of milk or juice).

Before workout: Joe Weider's PRESTRESS FORMULA drink.

Immediately after workout: Weider's ANABOLIC PAK and a light meal fortified with 2 teaspoons of LIFE ESSENCE (mixed with milk or juice).

Evening meal: Same as morning.

SHARE THE SECRET!

WEIDER HEALTH & FITNESS DEPT. MEAMPOL
21100 ERWIN ST., WOODLAND HILLS, CA 91367

Thanks Joe! For letting me use your revolutionary new *Anabolic Mega Paks*. Because of your tireless efforts I no longer need to take chances with steroids. Like the Super Stars, my muscles and strength will grow faster than I ever imagined, safely and naturally, without worry or stress. Count me in as one of your up-and-coming Super Stars by rushing me your new *Anabolic Mega Paks* today!

☐ (AMP 30) 30 Day Supply _____ $24.95 ☐ (AMP 60) 60 Day Supply* _____ $44.00

*SPECIAL INTRODUCTORY OFFER. MAIL ORDER ONLY

I've enclosed $_____ plus $1.50 for postage and handling. Sorry no C.O.D.s

California, New Jersey and Missouri residents add applicable sales tax

Name _____

Address _____

City _____ State _____ Zip _____

Credit card customers call *(800) 423-5713*. In California *(800) 382-3399*. These numbers are for orders only; no inquiries. Similar products are available in Canada. Contact: Weider Institute, 2875 Bates Road, Montreal, P.Q. H3S1B7

ATTACHMENT B

A new age begins...with the awesome power of Life Essence.

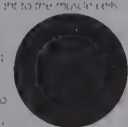
If you're using conventional protein sources to muscle up you're behind the times. With Life Essence, a new age has arrived.

Life Essence is pure, free amino acids — the essence of protein. And its patented process supplies all the essential amino acids that build muscle tissue — with none of the fats, cartons, fillers and additives found in other protein foods.

How Life Essence Builds Bigger Muscles — Faster!

[illegible] Life Essence

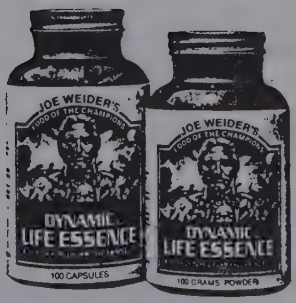
When you work out, the muscle tissues undergo stress. Unlike other protein sources that require digestion, Life Essence rushes through the bloodstream straight to the muscle cells, reassembling into the complex protein molecules needed for muscle development and recuperation. It works quickly and smoothly, enabling you to build pure muscular tissue without added bodyfat.



Life Essence is unlike any other amino acid source in the world. So unique [illegible] pending. It has a natural [illegible] stimulates [illegible] enhance the [illegible]

No wonder Life Essence [illegible] new age in bodybuilding.

Life Essence is available in capsule or powder form:
100 Capsules $24.95
100 Grams (Powder) $24.95



"LIFE ESSENCE: so revolutionary, it has a worldwide patent pending."

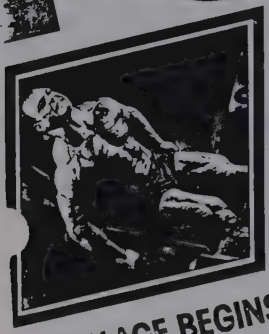
LIFE ESSENCE

Available at your local health food store

Similar products available in Canada, write for free catalogue to:
WEIDER INSTITUTE, 2825 BATE RD., MONTREAL, PQ H3S 1B7

ATTACHMENT C

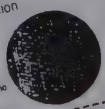
AWESOME POWER!



A NEW AGE BEGINS...WITH THE POWER OF LIFE ESSENCE

IT'S MADE OF THE SAME SUBSTANCE AS HUMAN MUSCLE!

Now, bodybuilders and anybody interested in maintaining their highest level of personal strength can come to the vital source of it all Life Essence. Life Essence is a combination of pure amino acids — exactly the same ones that go into production of muscle tissue. Life Essence has no fat, no carbohydrates, no additives of any kind. You don't even digest it! Life Essence is so pure, you assimilate it immediately — so it's unlike all other muscle building foods which are far less effective because of inefficiencies in digestion.



The diagram at right shows an electron micrograph of human skeletal muscle. The thin strands of protein and other muscle cell components are comprised of chains of amino acids. The same pure, free amino acids furnished with Life Essence.

HOW LIFE ESSENCE BUILDS UP HUMAN MUSCLES

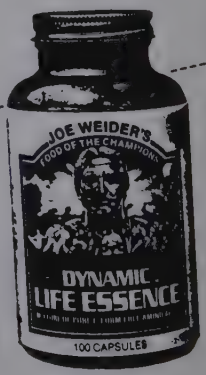
Exercise results in muscular stress. This stress causes a great craving within the muscle for life's building blocks in the form of pure, free amino acids — exactly like those found in Life Essence. When Life Essence is absorbed into the bloodstream, its amino acids quickly and efficiently find their way into muscle cells, seeking out the areas where they are needed most. Once there, an amazing natural chemical process occurs. The amino acids reassemble into complex protein molecules which cause rapid muscle development and cellular recuperation. But Life Essence does even more.

IT EVEN ACTIVATES ANABOLIC ACTIVITY!

Beyond everything else, Life Essence gently activates anabolic activity by coaxing the pituitary gland to secrete greater amounts of growth hormones into the bloodstream. These powerful hormones enhance the entire natural bodybuilding process, building your muscles quickly, insuring continued growth, definition and strength at levels far beyond those achievable with inferior protein sources.

ENTER THE NEW AGE OF POWER

Whether you are a bodybuilder, athlete or just a person who wants to keep fit, experience the awesome power of Life Essence and put it to work for you! It's the beginning of a new age of health, power and self-satisfaction.



WEIDER HEALTH & FITNESS, 21100 Erwin Street, Woodland Hills CA 91367

Rush me the order checked below I enclose $ _____ (plus $1.50 for each item. NOC.O.D.s. California residents add 6½% sales tax)

☐ 100 Capsules $24.95 ☐ 100 Grams (Powder) $24.95

Name _____ Age _____ ☐ Male ☐ Female

Address _____

City _____ State _____ Zip _____

Charge my ☐ MasterCard ☐ Visa Expiration date _____ Bank No _____

Account No _____ Signature _____

Or call toll free Weider Hot Line (MasterCard or Visa customers only): 1-800-423-5713 in California call 1-800-362-3393. These numbers are order taking lines only, no inquiries.

In Canada: Weider Institute, 2875 Bates Road, Montreal, H3S 1B7. Also available at your local health food store.

LIFE ESSENCE
AWESOME!

ATTACHMENT D

Take Your Body Beyond Steroids.

Now! The Secret is Out!

JOE WEIDER'S ANABOLIC MEGA PAK

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The result? A combination of natural ingredients so outstanding that its anabolic muscle-building effect could produce gains that approximate, in a physiological way, the muscle-building effect caused by the dangerous drugs it was designed to replace.

"It's Great! Now I can go into my high-intensity mass building routine without worry or stress."
Tom Platz.

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[illegible]

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The Weider Secret

Scientific research into substances that exert an anabolic effect on the human body was thoroughly reviewed to determine the exact combination of nutrients, dosages and intake schedules. Joe Weider found the secret! While others claim that their formulas produce anabolic effects, the truth is that they failed to look beyond their principal ingredients into the complex biochemical interactions that occur *after* the product is ingested! There's the *secret* to Joe Weider's ANABOLIC MEGA PAK! Weider's *unique* blend of ornithine and arginine is combined with the *exact* compounds necessary for the biochemical transformation of these powerful amino acids.

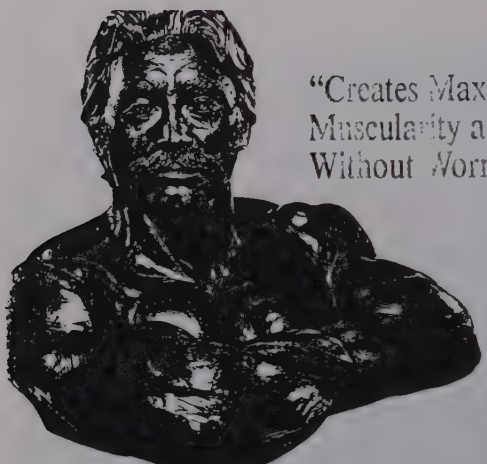
Scientists have known for years that certain amino acids (ornithine and arginine in particular), after being biochemically transformed to spermine, have the ability to stimulate the release of human growth hormone (hGH) from the pituitary gland. The Weider scientists discovered that certain mineral catalysts are required to ignite and maintain the transformation process until there is enough spermine change to trigger hGH release. Ornithine and arginine change to spermidine and finally spermine by interaction with exact ratios of magnesium, methionine, potassium, calcium and niacinamide. No other product on the market incorporates these important steps.

Muscle Growth Timetable

After spermine gently stimulates hGH release, this powerful hormone exerts its anabolic effect on the ribosomes of the muscle cells retaining greater amounts of nitrogen, enabling manufacture of more muscle-building protein for solid, lasting muscle tissue. Moreover fat deposits are mobilized, utilized as fuel for energy, thus causing reductions in bodyfat.

In addition to the hGH-stimulating amino acids, ornithine and arginine, Joe Weider has supplied your anabolic pak with a generous portion of his incredible new product, LIFE ESSENCE, a blend of all of the free form amino acids that are necessary to support muscular growth. Without these amino acids being available at the right time, there would be no growth.

Another powerful — yet totally natural — anabolic agent was added to the Weider Anabolic Pak. It is Serenoa — derived from saw palmetto berries. And it works! Better than any other herbs claimed to have anabolic characteristics, and far better than any form of animal glandular extracts. With Weider, you get the best available products.



"Creates Maximum Muscularity and Mass Without Worry or Stress!"
JOE WEIDER

All of the ingredients of Weider's ANABOLIC MEGA PAK are designed to act together in stimulating anabolism through the conversion of your body's natural testosterone into hydrotestosterone, and by stimulating the anabolic functions of cellular RNA and DNA—the muscles' genetic workhorses—further increasing your muscle-building capability! So, there you have it! Improved strength and muscle growth *nutritionally!*

The incredible effect of increasing your body's production of hGH also has multi-dimensional effects, synergistically improving human performance. These are functions that no anabolic steroid can provide.

HOW YOU USE IT.

To assure maximum anabolic activity, the Weider ANABOLIC PAK should be used as follows

Morning:

• **Breakfast:** Eat a normal meal supplemented with WEIDER'S GOOD LIFE multivitamin-mineral pak and DYNAMIC MUSCLE BUILDER protein powder fortified with a teaspoon or 5 capsules of LIFE ESSENCE free form amino acids. On days when you will not work out, take one ANABOLIC MEGA PAK immediately upon rising—about 30-60 minutes before breakfast.

• **Lunch:** Eat a normal meal fortified with a glass of Joe Weider's MUSCLE BUILDER protein powder

• **30 minutes before workouts:** Joe Weider's PRE-STRESS formula and one ANABOLIC MEGA PAK Taken this way, your ANABOLIC PAK ingredients will be available for improved anabolism when the most critical need for growth and development occurs—immediately after your workout!

• **During workout:** Take one serving of Joe Weider's CARBO ENERGIZER powder drink during your workout at the time when you feel your energy level starts to drop. (You may also take some of your CARBO ENERGIZER drink after the workout to aid recuperation, as well as before the workout to build energy levels.)

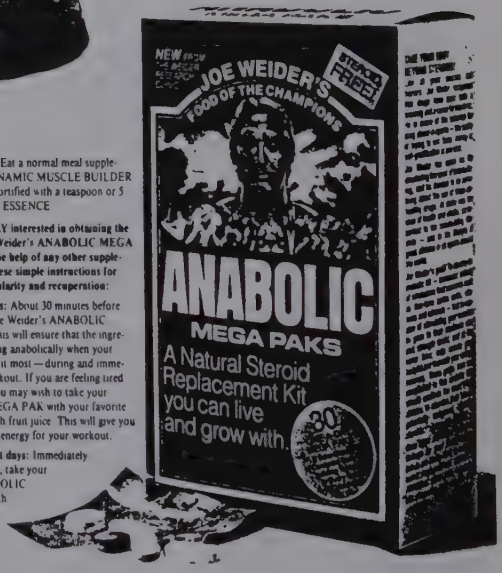
• **Immediately after workouts:** Eat a light small meal rich in protein and fortified with a teaspoon or 5 capsules of LIFE ESSENCE. This will greatly assist your recuperation process.

• **Evening meal:** Eat a normal meal supplemented with DYNAMIC MUSCLE BUILDER protein powder fortified with a teaspoon or 5 capsules of LIFE ESSENCE

If you're ONLY interested in obtaining the benefits of Joe Weider's ANABOLIC MEGA PAK, without the help of any other supplements, follow these simple instructions for maximum muscularity and recuperation:

On workout days: About 30 minutes before working out, take Weider's ANABOLIC MEGA PAK. This will ensure that the ingredients are working anabolically when your muscles demand it most—during and immediately after workout. If you are feeling tired and lethargic, you may wish to take your ANABOLIC MEGA PAK with your favorite carbohydrate-rich fruit juice. This will give you added vigor and energy for your workout.

On non-workout days: Immediately upon awakening, take your Weider's ANABOLIC MEGA PAK with some water. Wait about 30 minutes before eating your breakfast.



SHARE THE SECRET!

(Patent Pending)

WEIDER HEALTH & FITNESS DEPT MEAMP08
21100 ERWIN STREET, WOODLAND HILLS, CA 91367

Thank, Joe! For letting me use your revolutionary new *Anabolic Mega Paks*. Because of your tireless efforts I no longer need to take chances with steroids. Like the Super Stars, my muscles and strength will grow faster than I ever imagined, safely and naturally, without worry or stress. Count me in as one of your up-and-coming Super Stars by rushing me your new *Anabolic Mega Paks* today!

☐ (ANMP) 30 Day Supply ____ $24.95 ☐ 60 Day Supply* ____ $44.00
*SPECIAL INTRODUCTORY OFFER. MAIL ORDER ONLY
I've enclosed $ _____ plus $1.50 per item for postage and handling. Sorry no C.O.D.s
California and Missouri residents add applicable sales tax

Name _____

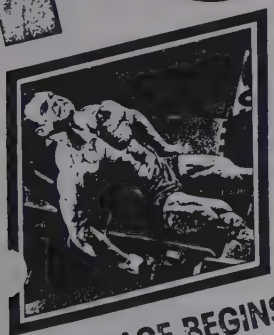
Address _____

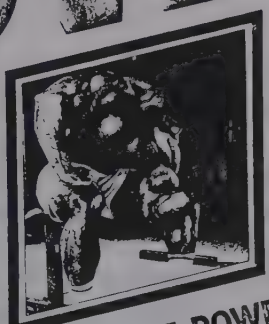
City _____ State _____ Zip _____

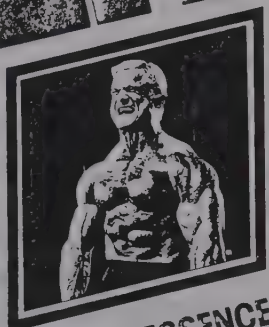
Credit card customers call (800) 421-7731. In California (800) 262-3199. These numbers are for orders only, no inquiries. Weider products are available in Canada. Contact: Weider Institute, 2875 Bates Rd., Montreal, P.Q. H3S1B7

ATTACHMENT E

AWESOME POWER!



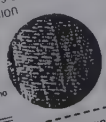




A NEW AGE BEGINS...WITH THE POWER OF LIFE ESSENCE

IT'S MADE OF THE SAME SUBSTANCE AS HUMAN MUSCLE!

Now bodybuilders and anybody interested in maintaining their highest level of personal strength can come to the vital source of it all Life Essence Life Essence is a combination of Pure amino acids - exactly the same ones that go into production of muscle tissue Life Essence has no fat no carbohydrates no additives of any kind You don't even digest it Life Essence is so pure, you assimilate it immediately so it's unlike all other muscle building foods which are far less effective because of inefficiencies in digestion



The diagram at right shows an electron micrograph of human skeletal muscle The thin strands of protein and other muscle cell components are comprised of chains of amino acids The same pure free amino acids furnished with Life Essence

HOW LIFE ESSENCE BUILDS UP HUMAN MUSCLES

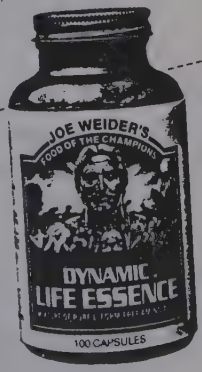
Exercise results in muscular stress This stress causes a great craving within the muscle for life's building blocks in the form of pure free amino acids - exactly like those found in Life Essence When Life Essence is absorbed into the bloodstream its amino acids quickly and efficiently find their way into muscle cells seeking out the areas where they are needed most Once there an amazing natural chemical process occurs The amino acids reassemble into complex protein molecules which cause rapid muscle development and cellular recuperation But Life Essence does even more

IT EVEN ACTIVATES ANABOLIC ACTIVITY!

Beyond everything else Life Essence gently activates anabolic activity by coaxing the pituitary gland to secrete greater amounts of growth hormones into the bloodstream These powerful hormones enhance the entire natural bodybuilding process, building your muscles quickly, insuring continued growth definition and strength at levels far beyond those achievable with inferior protein sources

ENTER THE NEW AGE OF POWER.

Whether you're a bodybuilder or anyone who wants to stay in the best of health, you really should grasp the awesome power of Life Essence and put it to work for you It's the beginning of a new age of health power and self satisfaction Life Essence the Mr and Miss Olympias use it shouldn't you?



WEIDER HEALTH & FITNESS, 21100 Erwin Street Woodland Hills CA 91367 DEPT FFLE08

150 Capsules $24.95 100 Grams (Powder) $26.95 Male Female

Name Age

Address

City State Zip

Charge my MasterCard Visa Expiration date Signature Bank No

Account No

Or call toll free Weider Hot Line (MasterCard or Visa customers only) 1 800 424 5713 In California call 1 800 284 3399 These numbers are order lines only no inquiries

In Canada Weider Institute 2875 Bates Road Montreal PQ H3S 1B7 Also available at your local health food store

(Patent Pending)

LIFE ESSENCE AWESOME!

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Weider Health and Fitness, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 21100 Erwin Street, Woodland Hills, State of California.

Respondent Joseph Weider is an officer of the corporate respondent Weider Health and Fitness, Inc. He has formulated, directed and controlled the acts and practices of that corporation. His address is the same as that of Weider Health and Fitness, Inc.

Respondent M.L.E. Holding Co., Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the Province of Quebec, Canada, with its office and principal place of business at 2875 Bates Road, Montreal, Quebec, Canada H3S 1B3. M.L.E. Holding Co., Ltd., owns Weider Health and Fitness, Inc. It has the authority to formulate, direct and control the acts and practices of Weider Health and Fitness, Inc., and derives significant financial

benefits from the allegedly deceptive acts and practices of Weider Health and Fitness, Inc.

Respondent Ben Weider is the President of M.L.E. Holding Co., Ltd., and has voting control of all shares of that corporation. In addition, he was a member of the Board of Directors of Weider Health and Fitness, Inc., until June 1, 1983. He has the authority to control the acts and practices of Weider Health and Fitness, Inc. His address is the same as that of M.L.E. Holding Co., Ltd.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I

It is ordered, That respondents Weider Health and Fitness, Inc., a corporation, its successors and assigns, and its officers, Joseph Weider, individually and as an officer of Weider Health and Fitness, Inc., M.L.E. Holding Co. Ltd., a corporation, its successors and assigns, and its officers, Ben Weider, individually, as a former director of Weider Health and Fitness, Inc. and as an officer of M.L.E. Holding Co. Ltd., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising the nutrient supplements known from 1983 to 1985 as "Anabolic Mega-Pak" and "Dynamic Life Essence" or of any other food of substantially similar composition, in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. A typical user of any such food will achieve greater or faster muscular development than a non-user;

B. A typical user of any such food will achieve results similar to or superior to those results bodybuilders generally believe are achievable through use of anabolic steroids, *e.g.,* rapid and substantial muscular development;

C. Any such food will stimulate greater production or release of human growth hormone, resulting in greater or faster muscular development in users than in non-users;

D. The nutrient supplement known from 1983 to 1985 as "Dynamic Life Essence" or any other food of substantially similar composition

is unlike any other amino acid source in the world, *e.g.*, it is unique; or

E. The nutrient supplement known from 1983 to 1985 as "Anabolic Mega-Pak" or any other food of substantially similar composition was developed by a team of the world's most renowned nutritional biochemists, exercise physiologists and trainers, unless it was so developed.

II

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising any nutrient supplement or other food, in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. A typical user of any such nutrient supplement or other food will achieve greater or faster muscular development than a non-user;

B. A typical user of any such nutrient supplement or other food will achieve results similar to or superior to those results bodybuilders generally believe are achievable through use of anabolic steroids, *e.g.*, rapid and substantial muscular development;

C. Any such nutrient supplement or other food will stimulate production or release of human growth hormone or any other bodily substance that affects or is represented to affect muscular development;

D. Any such nutrient supplement or other food is unique; or

E. Any such nutrient supplement or other food was developed, approved, tested or endorsed by any person(s) having the particular qualifications, status, reputation or expertise claimed

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. *Competent and reliable scientific evidence* shall mean for purposes of this order any test, analysis, research, study, survey or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

III

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising any nutrient supplement or other food, in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, marketed to assist users in achieving greater or faster muscular growth or development than non-users, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclusions of any scientific test, research article, survey or any other scientific opinion or data.

IV

It is further ordered, That respondents shall, within 30 days of service of this order, send a Notice Letter, Refund Form and Notarized Statement by first class mail, in an envelope, as described below, in all material respects consistent with, but not necessarily identical to, the materials attached to this order as Appendices A and B, and no other information, to all consumer mail order purchasers of the Anabolic Mega-Pak or Dynamic Life Essence, or both, whose orders Weider Health and Fitness, Inc. received on or before October 5, 1984, to all consumer telephone purchasers whose orders were received on or before September 30, 1984, to all consumers who answered respondents' Anabolic Mega-Pak questionnaire that appeared in the September 1984 issue of *Muscle and Fitness* magazine, to all current subscribers of *Muscle and Fitness* or *Flex* magazines, and to all consumers who call or write to respondents requesting information about this order. In addition, respondents shall send a pre-paid self-addressed return envelope, as described below, to all consumers to whom notice shall be sent by first class mail, except those consumers who are current subscribers to *Muscle and Fitness* or *Flex* magazine. Respondents are not required to send duplicate notice materials if a consumer falls within more than one of the foregoing categories.

The envelope that contains the Notice Letter, Refund Form, Notarized Statement and return envelope mailed to consumers shall contain in the upper left hand corner the following return address:

Federal Trade Commission/
Weider Refund Agreement
21100 Erwin Street
Woodland Hills, CA 91367

The envelope mailed to consumers shall also have the words "ADDRESS CORRECTION REQUESTED" and "RETURN POSTAGE GUARANTEED" in the upper left hand corner. For each Notice Letter for which respondents receive a corrected address, respondents shall within twenty-one (21) business days after respondents have received the corrected address send the Notice Letter, Refund Form, Notarized Statement and return envelope, addressed to the original addressee with the corrected address.

The pre-paid self-addressed return envelope shall contain the following words on the outside of the envelope under, on or below the envelope seal flap:

MAKE SURE YOU HAVE ENCLOSED
YOUR REFUND FORM AND

(for those who didn't purchase by mail or telephone from Weider)

ONE OF THE THREE WAYS OF SHOWING
PROOF OF PURCHASE

V

It is further ordered, That respondents shall place, at least twice in the first four (4) months after the date of service of this order, and cause to be disseminated in the national full-circulation editions of both *Muscle and Fitness* and *Flex* magazines:

(1) a prominently placed, conspicuously printed, black on white half page version of the Notice Letter attached to this order as Appendix A, or a half page Notice Letter in all material respects consistent with the NOTICE LETTER attached to this order as Appendix A; and

(2) a REFUND FORM and NOTARIZED STATEMENT form in all material respects consistent with those forms as they appear in Appendix B with the top half of the page containing the Notice Letter (Appendix A) separated from the bottom half by a dotted line and the bottom half containing the Refund Form and Notarized Statement.

VI

It is further ordered, That respondents shall in the manner described below offer reimbursement of the total purchase price paid for these products, (including costs of postage, handling and tax) to any mail order consumer purchaser of Anabolic Mega-Pak, Dynamic Life Essence, or both, whose orders Weider Health and Fitness, Inc. received on or before October 5, 1984, and to any consumer who purchased such product(s) on or before September 30, 1984.

Respondents shall mail refund checks, and no other information, within sixty (60) days of the closing date for receipt of both refund requests and proper evidence of purchase, for the total purchase price (including costs of postage, handling and tax) to those purchasers eligible to receive reimbursement who make requests and provide proper evidence of purchase on or before the closing date. Respondents shall reimburse each customer who is eligible for a refund and who did not use a postage-paid return envelope furnished by respondents to request a refund, an additional twenty-two cents ($.22). The dollar amount of reimbursements shall be based on Weider Health and Fitness, Inc.'s suggested retail price for Anabolic Mega-Pak and Dynamic Life Essence if records of actual purchase prices are not available. For purposes of this Order the "closing date" for receipt of refund requests shall be the last day of the month following the month in which magazines containing the second notice are offered for sale. For purposes of this order, *proper evidence of purchase* shall mean:

(1) for mail order purchases from respondents, respondents' own sales records of purchase orders received on or before October 5, 1984;

(2) for telephone purchases from respondents, respondents' own sales records of purchase orders received on or before September 30, 1984;

(3) for purchases of Anabolic Mega-Pak or Dynamic Life Essence by any other means,

(a) the portion of the Anabolic Mega-Pak box, or Dynamic Life Essence bottle label that contains the batch control numbers issued for those products on or before July 29, 1984; or

(b) copies of a receipt, invoice, credit card record or both sides of a cancelled check, dated on or before September 30, 1984, that indicate the specific product(s) purchased; or

(c) the NOTARIZED STATEMENT form attached to this order as part of Appendix B, or a form in all material respects consistent with the form attached as part of Appendix B. A Notarized Statement shall not be deemed "proper evidence of purchase" for more than two boxes of Anabolic Mega-Pak and two bottles of Dynamic Life Essence.

If respondents' own sales records do not confirm the amount a consumer claims to have purchased by mail order or telephone from respondents, respondents shall immediately notify the consumer of the consumer's right to verify the purchase with the same "proper evidence of purchase" available to other consumer purchasers, and shall, at the time all other refund checks are mailed, mail refund checks to such consumers in the amount that sales records do confirm.

VII

It is further ordered, That if the total of the amount of reimbursement respondents pay to purchasers of the Anabolic Mega-Pak or Dynamic Life Essence, or both, plus the amount respondents pay in postage for mailing of the Notice Letters, return envelopes and refund checks is less than Four Hundred Thousand Dollars ($400,000.00), then respondents shall in the manner described below donate an amount equal to the difference between the total of the amount paid in reimbursements and Four Hundred Thousand Dollars ($400,000.00), minus the amount paid for first class postage, to a university, foundation or research institute to which the National Science Foundation awarded program grants or contracts in Fiscal Year 1981 or any year thereafter for research in the fields of physiology, cell or molecular biology. The donation shall be payable in four equal installments over a four year period, the first payment to be made within one hundred and twenty (120) days of issuing the final reimbursement checks and each subsequent payment to be made no later than every twelve months thereafter. Such funds shall be designated "for the purpose of research on the relationship of nutrition to muscle development." Respondents may divide such funds between no more than two (2) recipients. Respondents' donation shall have no conditions attached thereto, including but not limited to retaining any proprietary interest in the results of the recipient's research or requiring the donation recipient to publish in any of respondents' magazines. No portion of these funds may be used to compensate any person, or his or her agent(s), who has been employed by, has consulted for, or has received remuneration from respondents at any time prior to the date of service of this order. In the event of default in any payment, which default continues for ten (10) days beyond the due date of payment, the entire remaining amount shall immediately become due, and be placed in escrow under control of the Federal Trade Commission for the benefit of the university, foundation or research institute previously designated by respondents to receive the funds.

VIII

It is further ordered, That whenever, in any publication that respondents own or control, respondents identify themselves as the funding source for the research referred to in Paragraph VII, they shall also state clearly and conspicuously that the funding was provided as part of a settlement agreement with the Federal Trade Com-

mission resulting from a complaint issued by the Federal Trade Commission.

IX

It is further ordered, That respondents shall, for at least two (2) years after the date of the last dissemination of the representation, maintain and upon request make available to the Federal Trade Commission at a place it designates for inspection and copying copies of:

1. All materials that respondents relied upon in disseminating any representation covered by this order.
2. All test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict any representation of respondents that is covered by this order.
3. All materials evidencing respondents' compliance with Paragraph VII above.

X

It is further ordered, That respondents shall for at least two (2) years after service of this order, maintain and upon request make available to the Federal Trade Commission at a place it designates for inspection and copying copies of:

1. Records evidencing the number and cost of Notice Letters sent to the U.S. Postal Service for mailing and the actual cost for mailing the return envelopes referred to in Paragraph IV above and the refund checks referred to in Paragraph VI above.
2. All Notice Letters returned to the respondents as undeliverable.
3. The name and last known address of each purchaser of the Anabolic Mega-Pak and/or Dynamic Life Essence, or both, who was sent the Notice Letter and the address to which any subsequent Notice Letter to that purchaser was sent.
4. A copy of each Refund Form, returned to respondents.
5. The name and last known address of each purchaser of the Anabolic Mega-Pak or Dynamic Life Essence, or both, who received reimbursement and the amount of such reimbursement.
6. The name and last known address of each purchaser of the Anabolic Mega-Pak or Dynamic Life Essence, or both, who requested reimbursement, was refused and the reason for each refusal to reimburse.

XI

It is further ordered, That the corporate respondents shall for ten (10) years following service of this order, notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order, or of any change in the positions or responsibilities of Joseph Weider or Ben Weider in regard to any corporation or subsidiary of which they are an officer.

XII

It is further ordered, That the individual respondents named herein shall promptly notify the Commission of their discontinuance of their present business or employment and of their affiliation with a new business or employment engaged in the manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising of any foods, physical fitness products or publications relating thereto, or the offering for sale, selling, distributing or advertising of any services relating to any foods or physical fitness, and, for a period of five (5) years from the date of service of this order, shall promptly notify the Commission of each affiliation with any such new business or employment, each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business of employment.

XIII

It is further ordered, That respondents shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

NOTICE TO CUSTOMERS WHO MAY HAVE BOUGHT ANABOLIC MEGA-PAK OR DYNAMIC LIFE ESSENCE

Weider Health & Fitness, Inc. (Weider) has recently entered into a consent agreement with the Federal Trade Commission (FTC) regarding its advertising for the "Anabolic Mega-Pak" and "Dynamic Life Essence." Weider has entered into this agreement for settlement purposes only and does not admit that it has violated the law.

This agreement contains four main provisions:

1) Weider's advertising will not claim that the Anabolic Mega-Pak or Dynamic Life Essence will cause greater or faster muscular development;

2) Weider will support all advertising claims for its food supplements with competent and reliable scientific proof;

3) Weider will offer refunds to eligible consumers who purchased Anabolic Mega-Pak or Dynamic Life Essence. To determine if you are eligible, complete and send in the attached form. You do *not* have to return unused portions of either product to qualify for a refund; and

4) Weider will fund research on the relationship of nutrition to muscle development. The amount of funding will be based on the refunds made in connection with this offer.

If you bought any of these products by mail or telephone from Weider Health & Fitness, Inc., just fill out the enclosed REFUND FORM. We will check it against our records of your purchases and the total amount you paid for them and then determine your eligibility. *This refund offer expires on (to be inserted).*

If you bought any of these products at a store, health club, etc., you may prove that you purchased them in one of three ways. Just enclose in an envelope the REFUND FORM *and* one of the following:

1. An original or copy of the receipt, invoice or credit card record or both sides of a cancelled check that indicates the specific product(s) you bought, *OR*

2. The portion of the Anabolic Mega-Pak box or the label of the Dynamic Life Essence bottle, that contains the blue 4 or 7–digit batch number (not the 10–digit UPC number), *OR*

3. A completed NOTARIZED STATEMENT,

AND mail the REFUND FORM and one of the three types of proof of purchase to:

Federal Trade Commission/
Weider Refund Agreement
21100 Erwin Street
Woodland Hills, California 91367

Weider Health & Fitness, Inc. will refund your postage if you are eligible to receive a refund.

Weider looks forward to serving you in the future.

Yours truly,
WEIDER HEALTH & FITNESS, INC.

By _____
Joe Weider

APPENDIX B

REFUND FORM

Please determine my eligibility for a refund and if I am eligible send me a refund for my purchases of (number) box(es) of, Anabolic Mega-Pak and/or (number) bottle(s) of Dynamic Life Essence that I made on (date(s))

Name	
Signature	Address

If you bought the Anabolic Mega-Pak and/or Dynamic Life Essence by mail or telephone from Weider and if you want a refund from Weider STOP here. You don't have to fill out or mail in anything else unless you also want refunds for purchases made at a store, health club, etc.

This refund offer expires on [to be inserted].

If you bought the Anabolic Mega-Pak and/or Dynamic Life Essence at a store, health club, etc., fill out and mail to us the REFUND FORM above, *AND* enclose:

1. An original or copy of the receipt, invoice credit card record or both sides of the cancelled check, that indicates the specific product(s) you bought, *OR*
2. The portion of the Anabolic Mega-Pak box or the label of the Dynamic Life Essence bottle, that contains the blue 4 or 7–digit batch control number (not the 10–digit UPC number), *OR*
3. A completed NOTARIZED STATEMENT.

NOTARIZED STATEMENT

State of _____)
) SS
County of _____)

I, (Your Name—Printed or typed) , being duly sworn on oath state as follows:

1) That I bought (number) box(es) of Anabolic Mega-Pak at the following places on the following dates:

_____

_____

and (number) bottle(s) of Dynamic Life Essence at the following places on the following dates:

_____

_____

2) That these facts are true and correct to the best of my knowledge.

_____
(Your Signature)

Sworn and subscribed before me this _____ day of _____, 198____.

_____
Notary Signature

IN THE MATTER OF

GENERAL MILLS FUN GROUP, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C–2965. Consent Order, May 15, 1979—Modifying Order, Dec. 11, 1985

The Federal Trade Commission has released General Mills, Inc. from its responsibilities under a 1979 consent order that prohibited misrepresentations in advertising by its toy producing subsidiary, but has said the order remains binding on the subsidiary's successor (93 F.T.C. 749). General Mills intends to spin off its toy-producing subsidiary, General Mills Fun Group, Inc., as an independent company called Kenner Parker Toys, Inc., and has no intention of reentering the toy business following the corporate action.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 20, 1985, General Mills, Inc.'s (Petitioner) request to reopen and modify the consent order entered against General Mills Fun Group, Inc. (respondent) by the Commission on May 15, 1979 [93 F.T.C. 749], in the above-captioned matter was placed on the public record for 30 days pursuant to Rule 2.51(c) of the Commission's Procedures and Rules of Practice. That order proscribes representing the performance, operation, use, size, or appearance of toys or related products which (1) cannot be duplicated by children in ordinary use; or (2) through the use of any commercial production technique misrepresents to children these characteristics, or (3) fails to disclose the need for human or mechanical assistance, when such failure, in the context of the advertisement as a whole, misrepresents to children such toy's performance or operation. Part III of that order applies the same proscriptions against Petitioner if it should engage in the advertising of toys, directly or through a subsidiary other than respondent. A second provision of Part III would make Petitioner liable for any penalties or other legal or equitable relief under the order if for any reason respondent or other subsidiary advertising toys while owned by Petitioner is not amenable to suit or execution of full judgment.

The respondent, General Mills Fun Group, Inc., through a series of name changes has become Kenner Parker Toys Inc. (Kenner Parker or respondent). On November 7, 1985, Petitioner spun-off Kenner Parker as a free-standing corporate entity that is now independent of Petitioner through a distribution of Kenner Parker's stock to Petitioner's stockholders of record. The newly independent Kenner Park-

er, with fiscal 1985 sales of $638 million and assets of $499 million, will be one of the largest toy companies in the world. As a result of this spin-off, Petitioner will no longer be engaged in the toy business and has stated that it has no present intent to reenter that business in the future. In addition, Petitioner is not in a position to oversee either the management or advertising of respondent Kenner Parker, formerly General Mills Fun Group, Inc. As a consequence of the foregoing, Petitioner requests that it be relieved of its responsibilities under the order by the setting aside of Part III.

Upon consideration of Petitioner's request and supporting materials, and other relevant information, the Commission finds pursuant to Rule 2.51 of the Commission's Procedures and Rules of Practice, 16 C.F.R. 2.51 that changed conditions of fact and the public interest warrants reopening and modification of the order in the manner requested. In doing so, the Commission notes that Kenner Parker, as a successor corporation, remains bound by the terms of the order and that a specific covenant to that effect was contained in the transfer documents between Petitioner, General Mills, Inc., and Kenner Parker.

It is therefore ordered, That the proceeding is hereby reopened and the order issued May 15, 1979 in Docket No. C–2965 as hereby modified by setting aside Part III thereof.

IN THE MATTER OF

HOSPITAL CORPORATION OF AMERICA

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C–3167. Consent Order, Sept. 30, 1985—Modifying Order, Dec. 16, 1985

The Federal Trade Commission has approved Hospital Corp. of America's proposed divestiture of a hospital in Midland, Texas, to ClayDesta Corp. The Commission also modified the 1985 consent order requiring the divestiture, so that HCA may retain the land that is the location for a planned hospital in Midland. (106 F.T.C. 298)

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED ON SEPTEMBER 30, 1985

By a petition filed on November 12, 1985, Hospital Corporation of America ("HCA") requests that the Commission reopen the proceeding in Docket No. C–3167 and modify the order issued by the Commission on September 30, 1985 [106 F.T.C. 298], to remove a parcel of land held by Doctors' Hospital of the Permian Basin, Inc. ("Doctors' Hospital") from the assets to be divested pursuant to Paragraph II of the order. Pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51 (1985), HCA's petition was placed on the public record for comments. No comments were received.

After reviewing HCA's petition and HCA's September 26, 1985, application for approval of the divestiture of its Parkview Hospital and the planned Doctors' Hospital, the Commission has concluded that the public interest warrants reopening and modification of the order. In the context of HCA's September 26, 1985, divestiture proposal, elimination of the requirement that HCA divest the parcel of land owned by Doctors' Hospital would facilitate the proposed divestiture which, in turn, will help achieve the remedial purposes of the order. HCA proposes to divest Doctors' Hospital to ClayDesta Corporation, an acquirer who intends to locate Doctors' Hospital on a site of its own choosing within the relevant geographic market. Therefore, ClayDesta does not desire to acquire the Doctors' Hospital land. Consequently, divestiture of the parcel of land currently owned by Doctors' Hospital is not essential to achieving the remedial goals of the order. Eliminating the requirement that HCA divest the Doctors' Hospital parcel of land, in the context of the proposed divestiture, does not appear to have any adverse competitive significance.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that *Schedule A: Stock and Assets to be Divested,* Paragraph A 2., of the order in Docket No. C–3167, be modified to read as follows:

2. Doctors' Hospital of the Permian Basin, in Midland, Texas (a planned new facility which, if and when it is completed, will replace Parkview Hospital). Provided, however, that HCA need not divest the parcel of land owned by Doctors' Hospital if the acquirer of Doctors' Hospital possesses another site within the Midland/Odessa area, intends to locate the hospital at that other site and, therefore, chooses not to acquire the Doctors' Hospital land.

IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9089. Order, Oct. 29, 1979—Set Aside Order, Dec. 30, 1985

The Federal Trade Commission has set aside a 1979 order with Atlantic Richfield Co. (ARCO) (94 F.T.C. 1054), so that the company is no longer required to divest its half-interest in Anamax, a joint venture. The Commission cited developments in the copper industry as rendering the Anamax divestiture and the original order unnecessary.

ORDER TERMINATING DECISION AND ORDER ISSUED OCTOBER 29, 1979

On August 30, 1985, Atlantic Richfield Company ("Arco") filed its "Request To Reopen And Set Aside Consent Order" ("Request"). The Request was submitted pursuant to Paragraphs XV and XVI of the Commission's Decision and Order issued on October 29, 1979 [94 F.T.C. 1054], ("the order") and also pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and terminate the order in its entirety. After reviewing respondent's Request and other relevant information, the Commission has concluded that Arco has made a satisfactory showing that changed conditions of fact and public interest considerations require that the order be terminated.

This proceeding arose out of Arco's merger with The Anaconda Company ("Anaconda") in 1976. The complaint was issued under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and charged that Arco's acquisition of Anaconda would eliminate three forms of competition: (1) actual competition between Arco and Anaconda in the production and sale of uranium oxide; (2) potential competition between Arco and producers of uranium oxide, including Anaconda; and (3) potential competition between Arco and producers of copper, including Anaconda, in copper mine production and in the production and sale of refined copper. At the time the complaint was issued, Arco, in addition to being a petroleum company, was a producer of uranium oxide through a joint venture operating in Clay West, Texas, with Niagara Mohawk Power Company and United States Steel Corporation. Anaconda was both a producer of uranium oxide and a miner and refiner of copper.

On November 2, 1976, a hearing was held in the United States

District Court for the Eastern District of Virginia on the Commission's motion for a preliminary injunction against the merger pending completion of the Commission's administrative lawsuit. On the same day, Arco announced a plan to sell its interest in the Clay West uranium joint venture to Niagara Mohawk and United States Steel. Later that day the district court denied the Commission's motion. The sale of Arco's Clay West interest was consummated on December 6, 1976. Thereafter, on January 12, 1977, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court, and the merger was consummated later that same day. *FTC v. Atlantic Richfield Company*, 549 F.2d 289 (4th Cir. 1977). The Commission's administrative proceeding continued and the parties subsequently entered into settlement negotiations. On October 29, 1979, the Commission issued its order in this matter.

The order required the divestiture of five specified copper interests that had been owned by Anaconda at the time it was acquired by Arco. These interests were the Heddleston copper and molybdenum mineral property; the Ann Mason copper mineral property; the Bear copper mineral property; its 20 percent stock holding in Inspiration Consolidated Copper Company; and its 50 percent joint venture interest in the Anamax Mining Company ("Anamax"), a copper miner and producer of copper concentrate and electrowon refined grade copper. The time allowed for Arco to accomplish divestiture ranged from a minimum of one year for the Inspiration stock to five years for the Anamax interest. The Order also imposed an acquisition ban and joint venture restrictions on Arco during a "limitation period" defined in the order. The limitation period was to expire after five years (on October 29, 1984), but was subject to a proviso extending the period for as much as an additional five years if the required divestitures had not been completed in accordance with a specified timetable.

Arco has accomplished all of the divestitures required by the order with the exception of its interest in Anamax. Arco sold its interest in Inspiration Consolidated Copper Company prior to issuance of the order. The Ann Mason and Bear properties were sold on August 25, 1981. The Heddleston property was sold to Asarco with the prior approval of the Commission as required by the order in September 1981. Since Arco did not divest its interest in Anamax within four years of the effective date of the order, the limitation period has yet to expire.

Respondent has established that there have been significant changes in the factual circumstances that prevailed at the time the complaint and order issued so that it is now appropriate to terminate the order. These changes include a decline in the market position of United States copper producers in general; a decline in the scope of

Arco's copper operations; and a sharp curtailment in the copper operations of Anamax.

Perhaps the most significant development since the order issued has been the inability of U.S. copper producers to sustain the two-tier pricing system which historically kept the U.S. price substantially above the price of copper sold outside the United States. Request, pp. 23–24. Imports of refined copper accounted for 27 percent of domestic refined copper consumption in 1983 as compared with 10 percent in 1979 and 9 percent in 1975. Request, p. 25 and Table I. The major exporting nations have kept producing at high levels while United States producers have been forced to cut back output. According to the International Trade Commission

> In a broad sense, the copper market is a world market. Both tariffs and transportation costs are small compared with the value of copper. As a result, arbitrage keeps the price of copper relatively the same throughout the world.

ITC, *Unwrought Copper: Report to the President on Investigation No. TA–201–52 Under Section 201 of the Trade Act of 1974* at A–56 (July 1984) (hereinafter "*ITC Report*"). U.S. producers "have no choice but to follow the depressed and declining world price of copper." *ITC Report* at 43–44. According to the ITC

> The current depressed state of the domestic copper industry reflects existing world market conditions and, therefore, is predominantly due to the low level of world prices which are transmitted to the U.S. industry through imports. Current world prices have been driven low by a combination of world overproduction and a decline in demand. In particular, a number of developing countries, with copper as their main source of foreign exchange, are continuing to produce and market increasing quantities of copper despite a worldwide glut, with plans to expand capacity even further in the near future.

ITC Report at 6–7. A substantial number of domestic copper production facilities have been permanently closed since 1979. *ITC Report* at A–22, A–23.

These developments have also had a significant adverse effect on Arco's own copper operations. In the period since the order was issued Arco has shut down all of its wholly-owned copper mines and has closed and scrapped its copper smelter and copper refinery. Apart from its interest in Anamax, respondent has not produced refined copper since the fall of 1980 and has not mined copper since June 1983. Arco has written down all of its copper and other non-coal mineral operations and is in the process of permanently exiting from these businesses. Request, p. 3. Likewise, the Anamax copper operations have been sharply curtailed. The only active Anamax copper operation is the processing of stockpiled copper oxide ore at the Twin Buttes oxide plant. Request, p. 36. In the opinion of the Commission,

the developments referred to above have rendered the divestiture of Arco's interest in Anamax unnecessary and have also made it appropriate to terminate the restriction on acquisitions and joint ventures imposed by the Order.

Accordingly, *it is ordered,* that this matter be, and it hereby is, reopened, and that the Commission's Decision and Order issued on October 29, 1979, shall terminate as of the effective date of this order.

IN THE MATTER OF

FEDERATED DEPARTMENT STORES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-3175. Complaint, Dec. 30, 1985—Decision, Dec. 30, 1985

This consent order requires a Cincinnati, Ohio retailer and its division operating 14 department stores in Texas (Foley's), among other things, to inform rejected credit applicants if it used information from credit reporting agencies as a basis for denying credit, and the name and address of the credit reporting agencies used. The order requires respondents to comply with the provisions of the Fair Credit Reporting Act, and is binding on all of Federated's divisions. Additionally, Foley's is required to review all credit applications rejected between January 1983 and February 1985 and send appropriate FCRA notices to all consumers who did not receive them.

Appearances

For the Commission: *Kristen L. Malmberg.*

For the respondents: *Michael Sohn, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Federated Department Stores, Inc., a corporation, hereinafter referred to as respondent, through its Foley's Division, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the accompanying order the following definitions are applicable:

A. The terms *consumer, consumer report, consumer reporting agency,* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating

that the consumer reporting agency has no credit history information in its files under the name and/or other identifiers supplied by respondent.

C. The term *information* shall be defined as information in a consumer report furnished to respondent by a consumer reporting agency reflecting slowly paid or delinquent credit obligations, garnishment, attachment, foreclosure, repossession, bankruptcy, suits or judgments, inquiries from creditors, an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit or insufficient positive information to meet such criteria.

PAR. 2. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Seven W. Seventh Street, Cincinnati, Ohio. Foley's is a division of Respondent. Foley's principal office and place of business is located at 1110 Main Street, Houston, Texas.

PAR. 3. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the evaluation of applications for credit to be used for personal, family or household purposes. In a substantial number of instances respondent denies credit applications from consumers applying for credit that they intend to use for personal, family or household purposes. The Commission has jurisdiction of the subject matter of this proceeding and of respondent, as provided by Section 621 of the Fair Credit Reporting Act, 15 U.S.C. 1681s, and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

PAR. 4. Respondent, in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agencies. In a substantial number of instances subsequent to April 25, 1971, respondent has denied consumers credit for personal, family or household purposes based wholly or partly on information in consumer reports. For example, Respondent has relied on information in more than one report and has relied on a "no file" response from the consumer reporting agency. In many such instances, at the time when such adverse action was communicated to the consumer, respondent has failed to disclose to the consumer that the credit denial was based wholly or partly on information in one or more consumer reports from consumer reporting agencies and has failed to supply to the consumer the name and address of each consumer reporting agency making such a report. By and through the use of such practices during the period from April 25, 1971 to the present, respondent has violated and

is violating the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 5. Pursuant to Section 621 of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a), the acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act and the Fair Credit Reporting Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed hereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Federated Department Stores, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 West Seventh Street, Cincinnati, Ohio. Foley's is a division of respondent. Foley's principal office and place of business is located at 1110 Main Street, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and this matter is in the public interest.

ORDER

Definitions: For the purpose of this order the following definitions are applicable:

A. The term *consumer, consumer report, consumer reporting agency,* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating that the consumer reporting agency has no credit history information in its files under the name and/or other identifiers supplied by respondent.

C. The term *information* shall be defined as information in a consumer report furnished to respondent by a consumer reporting agency reflecting slowly paid or delinquent credit obligations, garnishment, attachment, foreclosure, repossession, bankruptcy, suits or judgments, inquiries from creditors, an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit or insufficient positive information to meet such criteria.

I.

It is hereby ordered, That respondent Federated Department Stores, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any application by a consumer for credit that is primarily for personal, family or household purposes, do forthwith cease and desist from:

1. Failing, whenever such credit is denied wholly or partly or the charge for such credit is increased wholly or partly because of any information contained in a consumer report from one or more consumer reporting agencies (including a "no-file response"), to disclose to the applicant a) that the adverse action was based wholly or partly on information contained in such consumer report or reports and b) the name and address of each consumer reporting agency that made

such a report as required by Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

2. Failing to review each application for consumer credit as to which Foley's took adverse action between January 1, 1983, and February 4, 1985, to identify each of those applications as to which such adverse action was taken based wholly or partly upon information obtained from a consumer reporting agency.

3. Failing, within ninety (90) days of the date of service of this order, for each application identified according to paragraph 2 above, to send, as specified herein, the applicant a copy of the letter attached hereto as Appendix A or B, as applicable, and described herein. The letter shall be on Foley's letterhead and shall show the name and address of the applicant as shown on the application and the date of mailing. The letter shall disclose the name and address of the consumer reporting agency or agencies supplying the report(s) containing the information on which the adverse action was based. A letter need not be sent to any applicant whose application was identified pursuant to Paragraph 2 of this order, if the application file clearly shows that Foley's has previously sent the applicant an adverse action notification that complied in all respects with the provisions of Paragraph 1 of this order, nor to any applicant who subsequent to the adverse action on such application was granted credit by Foley's. Nothing in this order shall prohibit respondent from adding a paragraph to Appendices A and B that resolicits the previously rejected applicants if, preceding such paragraph, respondents insert the following language: "You may want to check your file at the credit bureau mentioned above to make sure it is accurate and complete before reapplying."

II.

It is further ordered, That respondent shall maintain for at least three (3) years, and upon request make available to the Federal Trade Commission for inspection and copying, documents that will demonstrate compliance with the requirement of this order, except that consumer application files need only be kept for the period required by Section 202.12 of Regulation B. 12 C.F.R. 202.12. Such documents include, but are not limited to, all credit evaluation criteria instructions given to employees regarding compliance with the provisions of the order, any notices provided to consumers pursuant to any provision of this order, and the complete application file to which they relate.

III.

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order. This provision shall remain in effect for a period of four (4) years from the date of this order.

IV.

It is further ordered, That Foley's shall deliver a copy of this order to cease and desist to all present employees engaged in reviewing or evaluating consumer reports in connection with applications for credit to be used for personal, family or household purposes, or engaged in preparing or furnishing notices to consumers as required by this order. In addition, respondent shall deliver a copy of this order to all present and future credit managers of each division, at least once per year, for a period of four (4) years from the date of this order.

V.

It is further ordered, That the respondents herein shall within one hundred fifty (150) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

Dear Customer:

Our records show that Foley's denied your application for consumer credit sometime after January 1, 1983. The Fair Credit Reporting Act gives persons denied consumer credit the right to be informed at the time credit is denied whether the denial was based on information supplied by a consumer reporting agency and, if so, the name and address of such agency. Credit Reports provide a variety of information to creditors, including information about how many and what type of credit accounts you have.

Consistent with an agreement we have made with the Federal Trade Commission, we have reviewed your application file. Our records show that we may not have informed you that we obtained a credit report in which we were advised by the consumer reporting agency that it showed no credit history for you. The consumer reporting agency from which we obtained the report is:

(Name of Consumer Reporting Agency)

(Street Address)

You have the right to contact the agency listed above to obtain complete information concerning your credit bureau file. However, that agency cannot tell you why credit was denied because it did not make the decision.

If you want more information about the federal credit laws, write the Federal Trade Commission, Division of Credit Practices, Washington, D.C. 20580.

Thank you.

APPENDIX B

Dear Customer:

Our records show that Foley's denied your application for consumer credit sometime after January 1, 1983. The Fair Credit Reporting Act gives persons denied consumer credit the right to be informed at the time credit is denied whether the denial was based on information supplied by a consumer reporting agency and, if so, the name and address of such agency. Credit reports provide a variety of information to creditors, including information about how many and what type of credit accounts you have.

Consistent with an agreement we have made with the Federal Trade Commission, we have reviewed your application file. Our records show that we may not have informed you that your Foley's application was denied wholly or in part because of information contained in a credit report. The consumer reporting agency (or agencies) that furnished the report is (are) identified below:

(Name of Consumer Reporting Agency)

(Street Address)

You have the right to contact the agency (or agencies) listed above to obtain complete information concerning your credit bureau file. However, that agency (or agencies) cannot tell you why credit was denied because it (or they) did not make the decision.

If you want more information about the federal credit laws, write the Federal Trade Commission, Division of Credit Practices, Washington, D.C. 20580.

Thank you.

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Unfair Methods or Practices, etc., Involved in this Volume:
Acquiring Corporate Stock or Assets
Advertising Falsely or Misleadingly
Aiding, Assisting and Abetting Unfair or Unlawful Act or Practice
Coercing and Intimidating
Collecting, Assembling, Furnishing or Utilizing Consumer Reports
Combining or Conspiring
Corrective Actions and/or Requirements

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Cutting Off Supplies or Service
Furnishing False Guaranties
Misrepresenting Oneself and Goods
—Business Status, Advantages or Connections
—Goods
—Prices
Neglecting, Unfairly or Deceptively, To Make Material Disclosure
Offering Unfair, Improper and Deceptive Inducements To Purchase or Deal

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